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RATIONALE

JUDICIAL EVIDENCE

RATIONALE
OF
JUDICIAL EVIDENCE.

OF

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LONDON:

PRINTED BY C. H. REYNELL, BROAD STREET, GOLDEN SQUARE.

JUDICIAL EVIDENCE

RATIONALE
OF
JUDICIAL EVIDENCE,

SPECIALLY APPLIED TO
English Practice.

FROM THE MANUSCRIPTS OF
JEREMY BENTHAM, Esq.
BENCHER OF LINCOLN'S INN.

IN FIVE VOLUMES.

III.

LONDON:
PUBLISHED BY HUNT AND CLARKE,
YORK STREET, COVENT GARDEN.

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JUDICIAL EVIDENCE



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EVIDENCE.

BOOK V.

OF CIRCUMSTANTIAL EVIDENCE.

CHAPTER I.

CIRCUMSTANTIAL EVIDENCE, WHAT—HOW DISTINGUISHED FROM DIRECT EVIDENCE.

THIS book has for its subject, Circumstantial Evidence.

In relation to this, as to all other objects within the compass of this work, its business and aim is to bring to view the course which, it is supposed, ought to be taken by the legislator and the judge.

By the legislator, the result will be, that, under this head, in the way of regulation, very little ought to be done: done, viz., in such sort as to coerce, in the way of obligation (positive or negative), the will and conduct of the judge.

What remains is, by apposite instructions, to hold up to view such considerations as promise to be of use, in the character of lights, to the understanding of the judge.

To the exercise of this function, power (political power) not being necessary; it is capable, indeed, of being exercised by the legislator, but

so is it of being exercised by any body else. Addressed more immediately to the legislator, as the fountain of all authority ; the judge is the person in whose conduct, if the instructions here endeavoured to be given are destined to have any influence, their influence will be more directly discernible. Instructions *to* the legislator, they are, at the same time, instructions as *from* the legislator to the judge.

Under the denomination either of *circumstantial* or of *direct*, every thing to which the denomination of evidence is applicable stands included.

When all the evidence is of that sort which is termed direct, no part of it of the nature of circumstantial, the case is such as affords not room for any *special* inference : for any other inference than that general one, by which, from the discourse by which the existence of this or that fact is asserted, the existence of that fact is inferred, and credited.

When evidence of the circumstantial kind presents itself, and either no evidence at all of the direct kind, or none that is of itself sufficient without the aid of the circumstantial evidence ; in every such case, inference—special inference—is necessary. Of some one fact at least (call it for this purpose the principal fact) the existence, with or without the aid of direct evidence applying immediately to that same principal fact, is inferred : viz. from the existence, as established by direct evidence, of some other fact ; or more commonly from some cluster of other facts : call them, for this purpose, *evidentiary* facts.

In every case, therefore, of circumstantial

evidence, there are always at least two facts to be considered : 1. the *factum probandum*, or say, the *principal* fact,—the fact the existence of which is supposed or proposed to be proved, — the fact evidenced to, — the fact which is the subject of proof: 2. the *factum probans*, — the evidentiary fact, — the fact from the existence of which that of the *factum probandum* is inferred.

The principal fact is in its nature susceptible of two main distinctions : it may be — it cannot but be—either of a *physical* or of a *psychological* nature. If it be a simple one, it cannot be of both natures at once: if it include both, it must be distinguished by the name of a complex or compound fact; for in practice, its properties will in this case be found to be different from what they are in the other.

This same distinction is alike applicable, in every instance, to the evidentiary fact; and the occasions for applying it to that latter object will occur as frequently as the occasions for applying it to the other.

The same fact which, with relation to one fact, bears the relation of a principal fact, will, with relation to another (or even the same) bear the relation of an evidentiary fact.

In this way, a chain of facts, of any length, may be easily conceived, and chains of different lengths will be frequently exemplified: each such link being, at the same time, with reference to a preceding link, a principal fact, and with reference to a succeeding one, an evidentiary fact.*

* Just so is it in the case of a chain of causality, a chain of causes and effects. Indeed, every chain of causality is a chain of evidence. Every effect is evidentiary of its causes: every cause, is evidence—is evidentiary—of its effects.

In a chain of this sort, it becomes necessary to distinguish the several precedential or introductory facts (principal and evidentiary) from the ultimate principal fact. The ultimate principal fact occupies that station only: it is the very fact sought: it is not viewed for the purpose of inducing a persuasion of the existence or non-existence of any other fact.

In all criminal cases, this fact is a complex fact; and in such case complex, as to include in its composition divers psychological facts, together with at least one fact of the physical kind, affirmative or negative.

In the case of direct evidence, the distinction between the principal fact and the evidentiary fact is alike applicable, and the union of the two alike indispensable, as in the case of circumstantial evidence. But in the case of direct evidence, the evidentiary fact is throughout of an uniform description. It consists in the existence of a person appearing in the character of a deposing witness, and, in the way of discourse, asserting the existence of the principal fact in question, on the ground of its having, in some way or other, come within the cognizance of his perceptive faculties.*

* This is alike true in the case of hearsay evidence (of which hereafter) as in that of the evidence of an immediate witness; only that, in the case of hearsay evidence, the fact, the existence of which is asserted by the so deposing witness, is — not the fact sought, not the ultimate principal fact — but only a fact supposed to be connected with it; the fact of his having heard, or otherwise perceived, a fact evidentiary with relation to it; viz. a statement given by some other person in relation to such principal fact. Here are two or more articles of evidence combined together; the one judicially exhibited, the other extra-judicially: but both of them belong alike to the head of direct evidence.

If, in order to make up a complete collection of the facts the proof of which is necessary to afford a ground for the decision in question, there is no need of forming any conclusion, — of drawing any inference, — of deducing the persuasion of the existence of any one fact from the existence of any other fact—in a word, from any other source than the direct assertion of a deposing witness, speaking in the character of a percipient witness; — in that case, the proof consists wholly of direct evidence; and nothing that comes under the notion of circumstantial evidence forms any part of it.

But so long as the body of proof, to make it complete, stands in need of any *inference*, (though it be but a single inference, and that ever so close and necessary a one), in so far an article of circumstantial evidence forms a necessary part of it.

In a case regarded as criminal, the body of evidence (unless it consist of confessorial evidence) cannot, if complete, be composed solely of direct evidence: how satisfactory soever, it cannot but include a mixture of circumstantial evidence. For, to constitute a criminal act, one or more facts of the psychological kind are indispensably requisite: in most instances, the sentiment of *consciousness*, with relation to the existence of divers exterior facts; in all cases, *intentionality*, viz. the intention of bringing about the obnoxious event, or at least of doing the physical act by which it is produced or endeavoured to be produced.*

* If the forbidden act be of the negative cast, it comes to the same thing; only,—instead of the *existence* of the intention in question,—the psychological fact in question, the psychological fact necessary to the composition of the crime, consists in the *non-existence* of it.

To complete the body of evidence necessary to the proof of a criminal act, proof of psychological facts (one or more) is indispensable: but, unless by the individual himself whose mind is the scene of them, no fact of the psychological kind can be proved by any direct testimonial evidence. Why?—Because, unless stated by the individual himself in whose mind the fact is considered as having place, the existence of any such psychological fact can only be matter of inference. What passes or has passed in my own mind, I know by my own internal consciousness, and without any inference: concerning what passes or has passed in the mind of Titius, I cannot know but by one or other of two means, viz. either from what he himself declares (so far as I credit what he says), or from the observations I have had the opportunity of making on the subject of his exterior deportment.

In regard to a complex act of this class (the class of criminal offences), direct testimony, therefore, consisting of extraneous testimony alone, cannot but be incompetent; or, at any rate, if a body of extraneous evidence be in itself complete, and (in its effects on the mind of the judge) satisfactory and persuasive, it will be so in part only, in the character of direct evidence; as to the other part (viz. in so far as any facts of the psychological class are proved by it), in the character of circumstantial evidence.

In regard to the existence of facts considered in the character of principal facts, it is no uncommon case for the persuasion to be indicated, and to find credence, and that with reason, on the ground of circumstantial evidence alone, without the aid of any direct evidence. But it

is seldom indeed that the body of evidence adduced in proof of any such principal fact, would, upon examination, be found to consist purely of direct evidence, unaccompanied by any admixture of circumstantial evidence.

This is so true, that, of a body of evidence (say the testimonial evidence of an individual *deposing* in the character of one who was at the time in question a *percipient* witness of the matter of fact in question) — of a body of evidence, delivered in the character of a body of direct evidence, — it is very rare that, upon examination, the whole would be found to consist of direct, without any admixture of circumstantial, evidence. Simple perception is the operation of sense; inference is the operation of the judgment. But, by the most constantly in exercise of all the senses, viz. *sight*, it is seldom that any belief of any matter of fact is produced, but that the judgment has been more or less at work in the production of it.*

The evidence afforded by any given mass of testimony is either direct or circumstantial, according to the relation it bears to the fact to which it is considered as applying. It is direct, in respect of any and every fact expressly narrated by it; and, in particular, every fact of which the witness represents himself as having been a percipient witness. It is circumstantial, in respect of any and every fact not thus expressly narrated by it; in particular, every fact of which the witness does *not* represent himself as having been a percipient witness, and the existence of which, therefore, is matter of inference, being

* See Berkeley's Essay towards a new Theory of Vision.

left to be concluded from its supposed connexion with the facts spoken to by the testimony in its character of direct evidence.

The testimony of a witness operates as circumstantial evidence, not only in regard to all facts which, not having been actually perceived by him, are by him inferred from facts which he has perceived: his testimony (or at least the fact of his giving utterance to such testimony) may operate further in the character of circumstantial evidence, in regard to facts which have neither been perceived nor inferred by *him*, but which are inferred by the *judge*, from the fact of his having uttered the testimony. In this case, the evidentiary fact is not the testimony itself, but the delivery of it by the witness.

In the character of direct evidence, the truth of any decision grounded on the testimony, will depend altogether upon the truth—the logical truth, the verity—of the testimony. If the facts are (whether knowingly or not knowingly) misrepresented by it, the decision will, in so far as the question of fact is concerned, be erroneous. In the character of circumstantial evidence, the truth of the decision will not depend upon the truth of the testimony: it will depend upon the truth, the justness, of the inference grounded on it; on the strength, the real strength of the connexion between the fact assumed (*viz.* the fact of the utterance of a mass of testimony, assertive of the fact purporting to be asserted by it) and the fact inferred from that same assumed fact. If the inference grounded on the testimony be a just inference, the decision grounded on that inference may be a just decision, although

the testimony which it has thus taken for its ground be false. A man suspected of a murder is interrogated on the subject of it by a judge : if, being guilty, he confesses the fact, (including the several circumstances necessary to fix it upon himself as the author of it, and in the character of a crime) there is no demand for inference,—the testimony amounts to a full confession, and operates purely in the character of direct evidence : — if, being guilty, he does not confess the fact, (he being at the same time pressed with the strings of questions which a man, acting on the occasion with an ordinary degree of zeal, probity, and intelligence, in the character of a judge, will not fail to ply him with),—the testimony thus extracted will almost always, or rather necessarily (in so far as he quits the intrenchments of non-responsion, or its equivalent, evasive responsion) contain a mixture of truth and falsehood. Now it is, that the testimony, not being, in respect of such part of it as is true, full enough to operate of itself with a conclusive force in the character of direct evidence, is consulted (as it were), and made to operate further, in the character of circumstantial evidence ; in which character it may be full enough to operate, and even conclusively ; affording full satisfaction—generating a full persuasion,—although, in the character of direct evidence, it was deficient.

But on this occasion, such parts of the testimony as are false, may (in so far as they are understood to be false) contribute in support of the conclusion, just as much as the facts that are true. For, not only when the whole narrative is viewed together, in a general point of

view, falsehood is, to the apprehension of every rational mind, a strong indication and symptom of delinquency,—of whatever modification of delinquency the defendant on the occasion in question happens to be suspected of,—but, in respect of the details of the transaction, this or that particular falsehood (an assertion representing this or that fact as existing at the time and place in question, which did not exist at that time and place, or representing as not existing at the time and place in question a fact which, at that time and place, did exist) will afford an inference (and that frequently a conclusive and perfectly satisfactory one) establishing this or that particular truth—the existence of this or that fact which then and there did exist, or the non-existence of this or that fact which then and there did not exist.

From the foregoing elucidations, the definition of an article of circumstantial, as distinguished from an article of direct evidence, may be deduced as follows: viz.—

The principal fact being given, and being the same in both cases; the evidentiary fact, constituting the article of evidence,—if it be of the nature of *direct* evidence, (having for its source a person, to wit a single person, and no more),—consists of an averment, statement, assertion, narration (all these mean the same thing), made by that person, averring that, at a specified time and place, the principal fact in question came within the cognizance of his senses: such assertion being expressed either by words spoken, or by written discourse, or even by gestures (or modifications of deportment), if such gestures were intended to convey an assertion to the

effect in question, instead of its being conveyed by words.

In the same case, (as above), the evidentiary fact in question, if it be of the nature of circumstantial evidence, may consist either of some physical fact, from a real source, or (if from a personal source) a psychological fact;* such psychological fact having necessarily for its index, some physical fact, issuing from the same personal source.

* Considered in respect of its *source*, all evidence flows either from persons or from things; — all evidentiary facts, as well as all principal facts, are afforded either by *persons* or by *things*.

Considered in its nature, all psychological evidence cannot come under any other denomination than that of *personal* evidence.

The description of *real* evidence,—of physical facts, whether considered as principal or as evidentiary,—is not alike narrow. Persons, being composed of matter as well as spirit, having their physical properties as well as their psychological properties, belong, in virtue and to the extent of their physical properties, to the class of things. Hence, real physical evidence may flow alike from a personal as from a real source; — personal evidence cannot flow from any but a personal source.

CHAPTER II.

OF PROBABILIZING, DISPROBABILIZING, AND INFIRMATIVE FACTS—EXAMPLES OF PRINCIPAL FACTS, WITH THE CORRESPONDING EVIDENTIARY FACTS—IMPROBABILITY AND IMPOSSIBILITY, HOW DISTINGUISHED FROM THE OTHER KINDS OF CIRCUMSTANTIAL EVIDENCE.

WHEN, of any principal fact in question, the existence is indicated by *direct* evidence, (no objection presenting itself to the trustworthiness of the deponent by whom the existence of it is asserted), it is said to be *proved*; and for the proof of every such fact by evidence of this description, a simple assertion, made by any one such person in the character of a deponent, is frequently (under English law at any rate) regarded as sufficient. The persuasion generated by it in the mind of the judge is of sufficient strength to give birth to a decision on his part; together with such acts of power, to which, on the occasion in question, a decision to the effect in question is in the habit of giving birth.

When, of the existence of the principal fact in question, no other indication presents itself than what is afforded by circumstantial evidence, it is seldom, very seldom, that by any single article of evidence of that description the fact

is considered as being *proved*: it is seldom that by any one such article, standing by itself, a persuasion, strong enough to constitute a ground for action, is constituted in the mind of the judge.

By some greater number of such lots of circumstantial evidence, taken together, the fact may be said to be *proved*. Of the *probative force* of any one of them taken by itself, the utmost that can be said is, that by means of it the fact is *probabilized*: — rendered, in a greater or less degree, *probable*.

As there are facts — evidentiary facts — by the force of which, a fact, considered in the character of a principal fact, is probabilized; so it will generally happen that there are others by which the same fact may be *disprobabilized*: — the existence of it rendered more or less improbable.

When a principal fact is thus probabilized, it is by the probative force of the evidentiary fact: by the strength of the inference by which, the existence of the evidentiary fact being affirmed, the existence of the principal fact is *inferred*. A fact being, in the character of an evidentiary fact, deposed to and considered as proved, and the principal fact in question considered as being thereby, in a certain degree, probabilized; it will often happen, that, by the bare consideration of some other fact, which is not proved, nor so much as attempted to be proved, the principal fact will be considered as being, in a greater or less degree, *disprobabilized*. Why? because, if the existence of this disprobabilizing fact be supposed (it being itself, in the case in question, not impossible), it will therefore be seen that, notwithstanding the existence of a probabilizing

fact, the existence of the principal fact is not in so high a degree probable, as it would be if the existence of the disprobabilizing fact were impossible.

Speaking with reference to the probabilizing fact in question, — any such disprobabilizing fact, thus contributing to *weaken*, to render *infirm*, the probative force of the probabilizing fact, may be termed an *infirmative* fact.

There are few, if any, probabilizing facts, in relation to which, one or more (commonly, if not constantly, more than one) infirmative facts would not, in case of an adequately diligent scrutiny, be found.

If, in one point of view, it be of importance that, — in relation to all facts which, with reference to any of those principal facts on the credit of which a man's station in society is disposed of, are wont to be considered in the character of probabilizing facts, — the probative force should be perceived and rightly estimated ; — in another point of view, it is a matter of correspondent importance that the several facts, bearing upon such probabilizing facts in the character of infirmative facts, should also be perceived as capable of having place, and the probative force of them, respectively, be rightly estimated.

Among the facts which will be brought to view in the character of principal facts, is *delinquency*. Among the facts which will be brought to view in the character of evidentiary facts, are various facts, the nature of which (supposing them proved) is to operate, with relation to any principal fact of that description, in the character of circumstantial evidence. Among the facts which will be brought to view in the character

of infirmative, and thereby of disprobabilizing, facts, are various facts, the force of which applies itself to divers of the facts just mentioned in the character of probabilizing facts, operating in that character with relation to delinquency.

In the instance of a fact of either description, supposing it either unseen, or the probative or disprobative force of it undervalued, the effect of such oversight or error may be fatal, with reference to one or other of the direct ends of justice. If the fact overlooked be a probabilizing fact, in relation to delinquency,—a wrongdoer may escape the burthen of punishment or satisfaction to which it was the intention of the law to subject him : if it be, in relation to any such probabilizing fact, an infirmative fact, — an individual who is not a wrongdoer may be subjected to punishment or the burthen of satisfaction as if he were.

In the case of delinquency, as in the case of a principal fact of any other description, the *probabilizing* facts in question (be it observed) are, by the supposition, not only brought to view, but *proved* ; so that, in regard to these, all that, for the instruction of the judge, can be done by human industry, is to give what little instruction can be given in relation to their respective degrees of probative force. But, of any regard paid to any of the *infirmative* facts that respectively apply to these several probabilizing facts, the nature of the case affords no such certainty : it is in this instance, therefore, that the need of instruction is the greatest : it is by bringing to view the facts of this description, that, by hands unclothed with authority, the greatest service

may be rendered to justice under the head of circumstantial evidence.

Overlooked they are in many instances not unapt to be. Accordingly, in the instance of one of the most illustrious luminaries of English law, an example will be seen,* in which, for want of due notice taken of the *infirmative* facts that bore upon the case, delinquency of the deepest dye (viz. murder) was considered as certain, in circumstances in which, regard being paid to those infirmative facts, it will perhaps, to a discerning eye, appear not more probable than innocence; at any rate, not to a sufficient degree probable, to afford a just ground for a judgment of conviction.†

To exhibit every fact capable of being considered in the character of a principal fact,

* Vide infra, chap. xvi. sect. 2.

† In speaking of evidentiary facts as having the effect of probabilizing the correspondent principal facts, some notice cannot but be taken of the opposite effect, *disprobabilization*. But, owing to the structure of language, in virtue of which, by so simple an expedient as the addition of a short particle (a particle expressive of negation), the same expression may throughout be employed to designate facts and other objects of a directly opposite nature; there will be little need for considering the probative force (the *disprobative* force it will here be to be held) in this latter point of view. To probabilize any given fact will be the same thing as to disprobabilize its opposite; to probabilize delinquency will be to disprobabilize innocence; to probabilize innocence will be to disprobabilize guilt.

But according as, in either instance (in the instance either of the principal fact or the evidentiary fact), the fact, to the designation of which the expression in question is applied, is of the positive cast or the negative cast (expressive of motion, or not), such a word as the word *probabilize*, or such a one as the word *disprobabilize*, will be the most directly and properly adapted to the nature of the case.

together with every fact capable of being, with reference to it, considered in the character of an evidentiary (*i. e.* either a probabilizing or a dis-probabilizing) fact,—and, moreover, every fact capable of being considered (with reference to such evidentiary fact) in the character of an infirmative fact,—would be to exhaust the stores, not only of jurisprudence, but of every thing else that has ever borne the name of science.

For the purpose of the present occasion, a selection must, therefore, necessarily be made, and this even among the cases liable to call for decision at the hands of judicature : for, in one way or other, to whatever branch of science it belongs, there is scarce an imaginable fact to which it may not happen to be an object of research, for the purpose of a decision sought at the hands of judicature. *Patents*, by which temporary monopolies are granted for the encouragement of inventions, suffice of themselves to subject to the dominion of judicature almost the whole practical department of the field of physical science : *wagers* have power to subject to the cognizance of the same authority every proveable fact without distinction. By a wager concerning the existence of phlogiston, the whole field of chemistry might have been laid at the feet of the judge.

In the selection here made, the object has been, to take such examples as, by the frequency of their occurrence, and the extent of the ground which they cover in the field of law, promise to be in a more particular degree serviceable towards the prevention of the erroneous conclusions to which the function of judication (so far as concerns the question of fact) is exposed.

Here follow examples of facts, which, in the character of *principal* facts (facts on the belief of which judicial decision depends, are susceptible of being probabilized or disprobabilized by correspondent *evidentiary* facts or groups of evidentiary facts, constituting so many articles of circumstantial evidence, such as are in use to be deposed to, and considered as proved, in a course of judicial investigation.

I. Principal facts considered as *probabilized* :

1. *Delinquency* in general; viz. any act by which the ordinances or supposed ordinances of the *law* (*i. e.* of the supreme power in a state) are transgressed. An enumeration of the several facts capable of serving, in the character of evidentiary facts, to probabilize a principal fact coming under this description (viz. the description of *delinquency*), will be given in the sequel of this book.*

* On contemplating the field of circumstantial evidence, an observation that will naturally present itself is, that it is to the penal branch of law that the topics apply, much more than to the non-penal branch. The reason is, that, for the most part, they consist in certain modifications of human conduct on the part of the supposed agent, and that those modifications have their origin in one common circumstance, consciousness of delinquency; or rather (to use an expression at once more correct as well as more extensive) apprehension of punishment. I say more correct; for, though apprehension of punishment may, without danger of error, be regarded as a necessary consequence of consciousness of delinquency, that consciousness cannot, without danger of error, be regarded as a circumstance necessarily precedent to apprehension of punishment: — a proposition in itself obvious enough, but which is at the same time but too apt to be overlooked, and which will therefore be, on several occasions, exemplified as we advance.

Not but that, in a case not penal, these symptoms of alarm will most of them be found not altogether inapplicable; inas-

2. *Intention* of performing any individual act belonging to a modification of delinquency, *i. e.*

much as the loss of the cause (whatever be the nature of the cause, and on whichever of the two opposite sides of the cause it takes place, the defendant's or the plaintiff's) is in its nature a result of an unpleasant kind, and, as such, is the natural object of an apprehension similar (howsoever far from equal in degree) to that which has the fear of punishment for its cause.

When, by the vision of the terrific hand of law, the emotion of fear is generated in the human breast, what is the specific source and cause of that emotion? Not the word *penal*; not the difference between that and *non-penal*; not the name of *punishment*; but the quantum of mischief or inconvenience apprehended as about to flow from this terrific source: under whatsoever name the infliction may stand designated.

In some of the highest degrees of the scale, the distinction between penal cases and cases not penal is substantial and effective. What then are those highest degrees? All those in which, (with relation to the individual in question, and his idiosyncratical sensibility), the quantum of affliction would be superior to the utmost that could result from the total loss of all his property: property in expectancy included or not included, as the case may be. Of the scale of legal suffering there is accordingly a certain part which is the peculiar production of the penal branch of law. It is the portion above delineated. Below the mark at which that superior part of the scale ends, is the common domain of both branches. For a cause which imports no stain on reputation, I am adjudged to pay five shillings: what matters it to me whether the cause is called a penal or a non-penal one? whether it be under the name of a penalty, or of damages, or by loss of a matter in dispute to that amount?

Within the compass of the ground which (as above) belongs in common to both branches, penal and non-penal, of the law, whatever distinctions have been made, whether on the occasion of the rules of evidence, or on any other occasion, are thus evidently groundless: and,—so far as they are employed and relied on in practice—confusion and error (confusion in conception, error in practice), are the necessary consequences.

The decisions of the legislator,—of the friend of mankind holding the sceptre of legislation,—are grounded on human feelings, regardless of every thing else. The decisions of the man of law, regardless of human feelings, taking the habits

to a species of acts forbidden by law; and thence (when the fact so intended to have place has taken place), the existence of such physical acts, as, on the part of the person in question, were necessary to cause it to have place.

For the correspondent evidentiary facts, see Chap. iv. of this book.

3. *Unauthenticity* or unfairness (on one or both sides), in the instance of a written instrument expressive of agreement or conveyance.

Correspondent evidentiary fact, *non-observance of formalities*: viz. of the formalities, the observance of which has been made by the law a condition to its binding force.

By the laws by which these formalities have been appointed, the evidentiary fact here in question has in general been considered as *conclusive* evidence of the principal fact. Concerning the propriety of so peremptory a conclusion, see the book on Preappointed Evidence, and the book having for its subject the *exclusions* customarily put on various modifications of evidence.

4. *Unauthenticity* (total or partial) of any instrument being, or purporting to be, of ancient date.

and interests and language of his profession for the standard of right and wrong, are grounded on words and phrases.

From the above considerations, many of the facts which will in the sequel be brought to view in the character of facts evidentiary of delinquency (with their respective trains of infirmative facts), may be seen to apply not to penal cases alone, but moreover to non-penal cases: and, in both sorts of cases, not to the station of defendant only, but moreover to that of demandant; at least, in so far as a demandant has any personal suffering to apprehend from the decision if pronounced in favour of the other side.

For the circumstances capable of serving in the character of evidentiary facts to *probabilize* this principal fact, *unauthenticity*,— or (which is the same thing in other words), to *disprobabilize* the *authenticity* of the instrument,—see a table of evidentiary facts of this description, taken principally from *Le Clerc's Ars Critica*.*

5. *Posteriora priorum*: any supposed *antecedent* acts in a number of supposed successive acts (whether forbidden by law or not), considered as following one another in a supposed naturally connected series: for example, as being, or being supposed to be, conducive to one and the same end; such as, in a law-suit, *success*, viz. on either side of the suit.

Correspondent evidentiary facts, — any acts proved to have been performed, and considered as having been performed in consequence of such supposed antecedent acts; for example, in pursuit of the same end.

See a table of evidentiary facts of this description taken from Comyns's Digest of English Law.†

6. *Priora posteriorum*: any supposed *consequent* acts in a number of supposed successive acts, considered as following one another in a supposed naturally connected series, as above.

Correspondent evidentiary facts, — any acts, proved to have been performed, and considered as having been performed *antecedently* to, and with the intention of their being followed by, such supposed consequent acts, as being means conducive to the same end.

* No such table is to be found in the MS.—*Editor*.

† This table, as well as that which is subsequently mentioned, is also wanting.—*Editor*.

See a table of evidentiary facts of this description, also from Comyns.

II. Principal facts considered as *disprobabilized*.

7. (1.) Any supposed act of delinquency : any act made penal, or though but disreputable : especially if in a high degree.

The correspondent disprobabilizing evidentiary facts, are *situations*: viz. situations in which the supposed delinquent is capable of being found placed. In the sequel of this book it will be seen, what situations can be considered to operate as circumstantial evidence *probabilizing* the existence of delinquency. Now, — whatsoever situation exhibits the supposed delinquent as in a certain degree exposed to the danger of falling into the species of guilt in question, — by a situation opposite to that seductive situation he will in a proportionable degree be guarded and fortified against that danger.

8. (2.) Any supposed *physical* fact whatsoever.

Short and general expression for all supposed facts, considered in the character of disprobabilizing facts with relation to the supposed fact, — *physical impossibility or improbability*. These disprobabilizing facts follow, in each instance, the nature of the supposed principal fact. Any facts, considered as affording the indication in question, being supposed to be established, whether by special proof or by their own supposed notoriety; there remains in each instance for consideration the question, whether the existence of the supposed principal fact is incompatible with the existence of the disprobabilizing facts ?

The principal fact being considered as proved (viz. by such special testimony, as, if not opposed by counter-evidence, would be regarded as sufficient for the proof of it); the decision will in this case turn upon the supposed preponderance of probative force, as between *special* testimony (the testimony of the witness or witnesses by whom the supposed fact is deposed to), and the supposed *general* testimony by which those facts which are regarded as incompatible with it are considered to be (as it were) deposed to; at any rate, as established on sufficient grounds.

Of the applications capable of being made of this modification of circumstantial evidence, the principal is that in which the extraordinary interposition of supernatural power is supposed: as in the case of sorcery, witchcraft, and such other operations, real or supposed, as have been designated under the general name of *miracles*.

9. (3.) Any supposed *psychological* fact whatsoever: *i. e.* any supposed fact, the supposed seat of which is in the mind of this or that individual human being.

Corresponding disprobabilizing facts shortly designated as above, *psychological improbability*.

The term *impossibility* is in this case omitted. The reason is, the want of uniformity and consistency on the part of all psychological facts as compared with physical ones. Correspondent and opposite to impossibility is *certainty*. But the case of *insanity* is of itself sufficient to prevent any state of the human mind from being considered in any instance as *certain*: and of insanity there are gradations innumerable;

many of them, at that end of the scale which is next to sanity, scarce distinguishable from it.

The last-mentioned species of circumstantial evidence — improbability or impossibility — has its nature something peculiar. In all the other kinds of circumstantial evidence, the evidentiary fact (whatever it be, — positive or negative), is at any rate something entirely distinct from, and independent of, the principal fact, the fact to be proved. In the case of improbability or impossibility, the evidentiary fact is not another and a distinct fact; it is no other than a property, or supposed property, of the principal fact itself; to wit (as will hereafter be seen), the property of being contrary to the order of nature.

Circumstantial evidence, therefore, may with propriety be distinguished into that which is afforded by other facts, and that which is afforded by the nature of the fact itself that is to be proved.

For the illustration of the first of these modifications of circumstantial evidence; taking for the principal fact, *delinquency*, considered in a general point of view; I shall bring to view the several classes of probabilizing facts bearing relation to it: accompanied with an indication of such facts as present themselves in the character of *infirmative* facts with relation to such of the above-mentioned probabilizing facts as are exhibited in a state particular enough to be susceptible of any such particular indications.

This done, from the mass of particular considerations thus brought to view I shall deduce such considerations of a general nature as pro-

mise to be of use in the way of instruction, either to the legislator or the judge; for which purpose the matter afforded by such of the circumstantial evidences as have for their principal fact *delinquency*, will, it is supposed, suffice.

I shall then pass to the consideration of that kind of circumstantial evidence which is afforded by the nature of the principal fact itself; viz. improbability and impossibility.

CHAPTER III.

OF REAL EVIDENCE, OR EVIDENCE FROM THINGS.

SECT. I.—*Of the Nature and Extent of Real Evidence.*

By *real* evidence, I understand all evidence of which any object belonging to the class of *things* is the source; *persons* also included, in respect of such properties as belong to them in common with things.

The properties of things are the subject-matter of the different branches of physical science. A work having for its subject any such branch of science, is, as to a great part of its contents, a treatise on circumstantial evidence. In this point of view, this comparatively small portion of our field of inquiry is of itself infinite.

On the present occasion, the inquiry is limited to the field of law. Even after this limitation, however, there is scarce an imaginable distinction or observation, an indication of which could, with reference to the subject of the present work, be charged with being altogether irrelevant: for, in one way or other, and

even in each instance in various ways, there is not an imaginable fact, the existence of which is not capable of being taken for the subject of inquiry in a court of judicature. No imaginable fact (for example), the existence of which may not (unless in case of legal prohibition interposed for special reasons) have been taken for the subject of a wager: on which occasion, whether the wager has been won or no by Titius, may become a question to be determined by a court of law. Add to this, the case of a premium offered for an invention or discovery; the case of a claim put in to the sort of temporary monopoly granted to inventors for the encouragement of inventions; and the case of a question whether a contract, respecting the practice of any branch of art, or the affording instruction in relation to any branch of science, has been properly fulfilled. Of the evidence that on any of these occasions may come to be exhibited, a portion more or less considerable (if not the whole) will come under the notion of the species of evidence already distinguished under the appellation of scientific evidence: but it is not the less true that the facts brought to view on such occasions respectively, are brought to view in the character of evidentiary facts, and are included in the field of legal evidence. If therefore the whole Encyclopædia were to be crowded into the body of this work, and into this part of it in particular, there is not a page of it, that (if relevant with reference to the particular branch of art or science of which it undertook to treat) would, strictly speaking, be irrelevant — could be justly chargeable with being altogether irrelevant — with reference to the

subject of this work. But, as the duration of human life, as well as human powers (psychological and physical), has its limits; it becomes matter not only of convenience but of necessity, to mark off and abandon to the labours of their respective professional and other appropriate cultivators, these several distinguished and pre-eminent portions of the field of evidence.

Even in the more limited field opened by the penal branch of law,—a prodigiously ample and diversified demand, a demand scarce susceptible of limitation, will be seen to present itself. Cases of homicide and personal injury (not to mention at present a great variety of other cases), are sufficient of themselves to draw deep upon the stores of medical science: cases of monetary forgery, upon the metallurgic branch of chemistry: cases of scriptural forgery, upon the arts of the engraver, the paper-maker, the letter-founder, the ink-maker, and (through one or other channel) upon the stores of chemistry.

Of all modifications of *real* evidence, the human body is that source which will serve best for exemplification: the matter afforded by it being at the same time of the most interesting nature, susceptible of the greatest variety, and capable of being brought to view in the smallest compass, proportionally to the importance of the instruction conveyed by it. The following table is a translation nearly literal of the heads offered in Plink's *Elementa Medicinæ et Chirurgicæ Forensis*, Vienna, 1781. A few articles are omitted; some as not being applicable to the present design; others as referring to vulgar errors, which, at this time

of day, no longer threaten to be productive of errors in judicature.*

Questions belonging to the cognizance of *criminal* tribunals.

I. Signs of homicide, by

1. Wounds.
2. Contusion.
3. Hanging.
4. Drowning.
5. Suffocation.
6. Poison.
7. Unskilful practice (medical or chirurgical).
8. Suicide.

II. Signs of infanticide, by

1. Wounds.
2. Contusion.
3. Suffocation.
4. Starving.
5. Cold.
6. Heat.
7. Drowning.
8. Omission to tie the navel-string.
9. Omission to administer medical remedies against debility.
10. Abortion purposely procured.

III. Signs indicative of ability or inability

* In this table, the several articles consist of so many species of principal facts, facts supposed to be evidenced. The corresponding lists of evidentiary facts, expressed here by the word *signs*, are exhibited in the corresponding divisions of the book. To have transcribed them would have been to transcribe the whole work, consisting of 184 pages. Specimens, however, have been exhibited, in the case of *homicide* in general, and of *infanticide* in particular.

to endure divers corporal inflictions, for the purpose of punishment or compulsion.

IV. Grounds of exemption from punishment on the score of infirmity (bodily or mental) existing at the time of the act of delinquency.

Questions belonging to the cognizance of *civil* tribunals.

1. Signs disproving alleged paternity.
2. Signs disproving alleged maternity.
3. Signs of a child's being born alive.
4. Signs of a child's being born dead.
5. Signs of a child's being born at full time.
6. Signs of prematurity of birth to a degree not inconsistent with continuance of life.
7. Signs of prematurity of birth to a degree inconsistent with ditto.
8. Signs of birth at a period so late as to be incompatible with alleged paternity.
9. Signs of a supposititious child.
10. Signs of a child conceived in the way of superfœtation.
11. Signs of the first born among twins, &c.
12. Signs of fictitious pregnancy.
13. Signs of concealed pregnancy.
14. Signs of real parturition.
15. Signs of fictitious parturition.
16. Signs of defloration.
17. Signs of rape.
18. Signs of particular ages.
19. Signs of divers fictitious diseases.
20. Signs of divers concealed diseases.
21. Signs of false imputation of disease, in divers instances.

Questions belonging to the cognizance of *ecclesiastical* tribunals.

1. Signs of barrenness in females.
2. Signs of impotence in males.
3. Signs of monstrosity.
4. Signs of doubtfulness in regard to sex.

For the reasons already stated, the inquiry is in the present instance limited to the penal branch of law. The fact sought, and concerning which on each occasion the question is whether it be evidenced or no, is delinquency: the evidentiary facts are any and every fact, considered as capable of operating in that character with reference to the fact sought.

Division of *things*, considered as sources of real evidence: the source of the division being the nature of the relation they respectively bear to the fact of delinquency, considered as the fact *indicated*.

I. Subject matter of the offence itself.—1. The person killed or hurt. 2. The thing stolen or otherwise taken in the way of depredation, or damaged, or destroyed. 3. The instrument of contract fraudulently uttered or fabricated. 4. The genuine money diminished; the counterfeit money fabricated.

II. Fruits of the offence.—In the case of depredation above mentioned, it is the goods taken in the way of depredation which constitute the immediate fruits of the offence: in the case of forgery of written instruments, and monetary fabrication, it is the profit, in whatsoever shape obtained: in the case of subduction by monetary forgery, it is the quantity of valuable matter subducted.

III. Instruments of the offence.—Examples.
1. In the case of homicide or other bodily

injury, the pistol, sword, club, knife, or other weapon: in case of poisoning, the poison. 2. In case of depredation by housebreaking, the picklock keys, the crow or chisel, the ladder. 3. In case of incendiarism, the combustibles. 4. In case of forgery, the engraved plates, the instruments for the fabrication of the appropriate papers. 5. In case of monetary forgery, the coining tools.

IV. Materials of the subject matter of the offence, or of the instruments of the offence: when they happen to have any thing appropriate in their nature, exclusively or peculiarly fitting them for being converted into instruments of the offence. Examples: 1. Silver or gold, in plates, or other suspicious forms, where coining is the offence in question. 2. Laurel leaves for distillation, where poisoning is the fact in question. 3. Drugs calculated for the purpose of adulteration, found in large quantities in the possession of a dealer in the article which such drugs are capable of being employed to adulterate.

V. Receptacles enclosing or having enclosed (as above) 1. the subject-matter; 2. the fruits; or 3. the instruments, of the offence. Example, 1. the clothing of the person killed or hurt: 2. the house, ship, room, closet, stable, waggon, chest of drawers, package, case, in which the goods stolen, damaged, or destroyed, or the instruments or materials of the offence, were contained.

VI. Circumjacent (detached) bodies. Bodies circumjacent (though detached), with reference to any of the objects above enumerated. Examples: the floor on which the person killed or wounded was standing; the chair on which

he was sitting ; the bed on which he was lying ; the pathway spotted by his blood.

It is in virtue of some peculiarity in their *condition*, that the things in question are qualified to become sources of real evidence, of evidentiary facts, with reference to the modification of delinquency in question—the fact indicated.

This condition may to the purpose in question be distinguished into relative and absolute ; relative, bearing to the person in question any such relation as has the effect of indicating him in the character of the delinquent ; absolute, indicating (without any indication of the person) the existence of the obnoxious event, (the death, the damage to property by fire or other cause,) coupled or not with the indication of its being referable to human delinquency as its cause.

Physical *real* evidence (whether issuing from a real or from a personal source) requires to be distinguished into *immediate*, and *reported*. I call it *immediate*, in the case where the thing which is the source of the evidence is made present to the senses of the judge himself. I call it *reported*, in the case where it is not made present to the senses of the judge himself,—but the state of it in respect of the evidence, the evidentiary facts, said to be afforded by it, is presented to the judge no otherwise than by the report made of it by a person, by whom (in the character of a percipient witness) the state and condition of it in respect of the evidentiary facts in question is reported by him to have been observed.

In the case of immediate real evidence (as above described), the evidence is of the circum-

stantial kind purely : it is a case of purely real, purely circumstantial evidence. In the case of reported evidence, it is of a compound or mixed kind, composed of supposed real evidence exhibited through the medium of personal ; of circumstantial, exhibited through the medium of direct, evidence. To the reporting witness indeed, if his report be true, it was so much immediate, so much pure real evidence : but to the judge it is but reported real evidence.

The distinction is far from being a purely speculative one : practice requires to be directed by it. Reported real evidence is analogous to hearsay evidence, and labours more or less under the infirmities which attach to that modification of personal evidence, compounded of circumstantial evidence and direct, — of real evidence, and ordinary personal evidence (evidence given in the way of discourse) : it unites the infirmities of both. The lights afforded, or said to have been afforded, by the real evidence, are liable to be weakened in intensity, and altered in colour, by the medium through which it is transmitted : a topic which will come to be considered in the book which treats of *makeshift* evidence.

From this infirmity results an obvious practical rule, viz. not to receive real evidence in the form of reported real evidence, when, without preponderant inconvenience, it can be had in the form of immediate real evidence : a rule exactly analogous to that which is alike obvious in the case of the analogous species of evidence called hearsay evidence. But of this elsewhere.

SECT. II.—*Infirmative facts applicable to Real Evidence.*

THE evidentiary (*i. e.* the criminative or inculpative) facts belonging to this class being in so prodigious a degree multifarious; in a correspondent degree multifarious must be the facts that apply to them respectively in the character of infirmative facts.

Yet, except in so far as the connexion between the principal fact and the evidentiary fact is *necessary*, there is not one such evidentiary fact but must have its correspondent infirmative facts, by the possibility of which its probative force is diminished.

Not that facts are altogether wanting, which (the evidentiary facts being by the nature of the principal fact so many *criminative* or *inculpative* facts) are applicable in common to all evidentiary facts belonging to the class of real evidence.

Of the infirmative facts of this description, five examples may be designated as follows, viz.

1. Accident. The appearance unquestionable, but not having for its cause any agency of the supposed delinquent, directed to the production of the forbidden result in question: being produced either by causes purely physical, or (if with the intervention of any human agent acting in pursuit of any end) produced either by some other person, or by himself in pursuit of some unforbidden end.

2. Self-exculpatory forgery in relation to real evidence, (*viz.* the evidence composed of the

appearances in question), committed by some other person, guilty either in respect of the offence in question or some other offence. See, further on, *forgery in relation to Real Evidence*.

3. Like forgery committed by some other person, who—though not guilty in respect of the offence indicated by the real evidence in question in its genuine state—yet, under the apprehension of the indications it affords to his prejudice, alters the appearance in question, with a view to the doing away of those indications.*

4. Like forgery committed by another person, in the view of subjecting the defendant to

* In a tale of the Arabian Nights' Entertainments (the Little Hunchback), the body of a man who died by accident finds its way into the house of an innocent man, and from thence (under the apprehension inspired by the fear of its operation in the character of real evidence) into a series of other houses. Not many years ago, the story was introduced upon the English stage. So many transfers (as above); so many exemplifications of real evidence; so many exemplifications of a forgery, and at the same time an innocent forgery, of real evidence.

The case of Captain Donnellan, who was hanged for the murder of sir Theodosius Boughton, gave occasion to an anonymous treatise on the subject of circumstantial evidence. Under a system of penal procedure distinguished beyond all others for its favourableness to the defendant, instances (it thence appears) have been but too abundant, in which innocence has sunk under the weight of fallacious real evidence. In any of these instances, suppose the defendant, thus pressed, endeavouring to remove the pressure; you have so many instances of forgery, and that innocent forgery, of real evidence. In the instances where the undue and irreparable punishment took place, the fault (let it be observed) lay not so much, if at all, in the system of procedure, as in the substantive branch: in the making use of a species of punishment, which, were it only because the mischief of it is irreparable, would be unfit for use.

the imputation in question for a malicious purpose ; *i. e.* for the purpose of causing him to suffer (either at the hand of the law or in the way of reputation) as if the offence in question had had him for the author of it or a partaker in it.

5. Like forgery committed in sport ; *i. e.* without any design to subject the individual in question either to legal punishment or lasting disrepute, but only to momentary alarm.*

SECT. III. — *On the circumstantial evidence of delinquency, afforded by the possession of an article of criminative Real Evidence.*

NOTHING is more familiar than the word *possession* ; nothing more variable and indistinct than the ideas which are wont to be attached to that word : but, in so far as on any occasion it is considered as being applicable in such sort that a thing considered as a source of criminative real evidence, being such in relation to the supposed delinquent in question, is considered as being in his possession,—in so far is the relation indicated by the word possession apt to be considered as evidentiary of delinquency in his instance. Of this species of criminative circumstantial evidence, possession of stolen goods affords the most obvious and frequently exemplified case.

Of possession of criminative evidence, the probative force will be liable to be varied according to a distinction expressible by the terms

* Example—story of Joseph and his brethren.

actual and *antecedent* : actual, when, at the very time in question, the thing in question is supposed to be found in possession of the supposed delinquent ; antecedent, when it is only supposed to have been in his possession at some antecedent point of time.

In the latter case, its *identity* is supposed, but is liable to become the matter of an additional question : in relation to which question, this or that supposed intrinsic mark of ownership, designed or undesigned, will frequently present itself in the character of an article of *real* evidence, serving to probabilize the supposed fact in question ; viz. that the thing which is not now, was at some antecedent point of time, in the possession of the supposed delinquent.

To possession of criminative real evidence, in its character of a fact evidentiary of delinquency, apply, in the character of infirmative facts, those five which we have seen applying to real evidence itself when considered as criminative.

Additional infirmative facts applying to possession of criminative real evidence, and not to the real evidence itself, are,

6. (1.) *Unconsciousness* : when, though the situation of the thing in question is or has been such as to warrant its being said to be or to have been in the possession of the supposed delinquent, he himself has never been conscious of its being so : a state of things that may naturally enough have been brought into existence by any of the five causes enumerated (as above) under the head of real evidence.

7. (2.) *Clandestine introduction.* Subsequently to the introduction of the thing into the place by its introduction into which it is put into his possession, he becomes conscious of its being there; but, of the operation by which it was introduced, he had not, while the operation was going forward, any knowledge.

8. (3.) *Forcible introduction:* when it was with his knowledge indeed, but against his declared or known will, that the thing in question was placed in that situation in which it is considered as being in his possession: as, if, by conspiracy among three men against one, one lays hold of both his hands, another puts into his pocket a stolen handkerchief, which the third, running up during the scuffle, finds there.

By the circumstance of *force*, supposing it proved, the criminative effect of possession (as above) would be destroyed altogether: but what may happen is, that the possession shall have been proved, when the force is not proved.

9. (4.) In case of supposed antecedent possession (as above), — *non-identity* of the thing in question. The man is seen running, and, on the path which he has been taking, a handkerchief is seen lying. A handkerchief resembling it had been seen in his hand; but, though similar, it was not the same.

10. (5.) *Furtherance of justice:* receipt or seizure of the thing in question, in the view of applying it to its use in the character of a source of criminative evidence: as in the case of an official minister of justice so demeaning himself in the execution of his office, or an individual volunteering his services to the same effect.

Nothing can be more persuasive than the cir-

cumstance of possession commonly is, when corroborated by other criminative circumstances : nothing more inconclusive, supposing it to stand alone. Receptacles may be contained one within the other, as in the case of a nest of boxes : the jewel in a case ; the case in a box ; the box in a bureau ; the bureau in a closet ; the closet in a room ; the room in a house ; the house in a field. Possession of the jewel, *actual* possession, may thus belong to half a dozen different persons at the same time : and as to *antecedent* possession, the number of possible successive possessors is manifestly beyond all limit.

Connected with this subject, is the consideration of the probative force of *possession of criminative written evidence*.

When written evidence,—such as (supposing it to have for its author the supposed delinquent) would, in the character of confessorial evidence, tend to induce a persuasion of his being guilty of the offence in question,—is found in his possession ; the mere circumstance of its being in his possession will of itself, if separated from the circumstances that are so apt to be connected with it, scarce be capable of possessing criminative force sufficient to entitle it to the denomination of criminative evidence.

If, indeed, possessing with regard to him this criminative tendency, and speaking in his own person, it appears upon the face of it to be written with his own hand, (as in the case of a memorandum written for his own use, or a letter written by him and intended to be sent to the person to whom it is addressed, but not sent) ; there is no doubt that,—if, being spoken,

it would have amounted to self-criminative (*i.e.* to confessorial) evidence, — it will, being written, amount to no less. But in this case its criminative force depends altogether upon what it contributes in the character of *confessorial* evidence, towards inducing a persuasion of his having been concerned in the forbidden act. From the circumstance of its being found in his possession, it can scarce be said to derive any probative force over and above what it would have possessed if found any where else : if, for example, being a letter, it had been sent to the person for whom it was designed, and by him produced in evidence.

It being still of such a nature as (had it for its author, as above, the supposed delinquent, and were it spoken in his person) would operate against him in the character of confessorial evidence ; suppose it were to have for its author another individual, writing and speaking of the criminal transaction in question ; whether in the character of an accomplice or an accuser. With a probative force proportioned to the strength of the indication afforded by it, and to the trustworthiness of the writer, it would operate in the character of the weak and makeshift species of evidence which will be brought to view in the next book under the name of *casually-written* or written casual evidence. But, from the circumstance of its being found in the possession of the supposed delinquent, it would scarcely derive any probative force, over and above what it would have possessed, if, in its way to his house, it had been intercepted (for example, at a post-office).

Addressed to him by word of mouth, — or even,

although not addressed to him, if spoken in his presence,—a discourse of exactly the same tenor might have operated against him with a considerable degree of probative force. Why? Because,—when the supposed delinquent and the virtual accuser were (at the time of uttering the virtual accusation) in presence of each other, — not only the motive to contradict the accusation in case of its falsity, but the opportunity, the opportunity for immediate contradiction, exists. Non-contradiction of criminative discourse operates therefore as evidentiary of confession; though not without standing exposed to the debilitative force of various infirmative facts. But, where the form of the criminative discourse was in writing, and the parties not in presence; the opportunity of immediate contradiction not having place; the circumstance of the writing's being found in the possession of the individual so addressed by it, scarce affords, of itself, any the slightest inference.

In the case of real evidence, possession may indeed, and not unreasonably, be considered as operating in the character of a criminative circumstance. Why? Because, by possession of things fit for use, a most natural (though sometimes not an infallible) presumption is afforded of actual use and ownership: including under the head of use, in the case of a mercantile man, *sale*, as being a mode of using particularly adapted to his situation in life.

But, as in the case of real evidence a man's having possession of a thing of any sort affords of itself scarce any presumption of his having made it; so, in the case of written evidence, mere possession of a manuscript of any kind,

not being in his own hand-writing, affords scarce any presumption of his having been the author of it. In regard to writings, as in regard to chairs and tables, possession is good evidence of ownership: but of the possessor's being the author of the writings, it is not much better evidence than of his having made the chairs and tables.

True it is, that, where the authorship has for its proof similitude of hands (which is a sort of real evidence), possession adds probable force to it. Why? Because, if it be extraordinary that writing, bearing such a degree of resemblance to that of Reus, should not be his, it is still more extraordinary that writing bearing such a degree of resemblance to that of Reus, and moreover found in his possession, should not be his.

Taken by itself, so weak is the probative, the criminative force of written evidence, (understand all along such written evidence the tendency of which is to fix the imputation of the offence in question on the individual in whose possession it happens to be found), that it is scarce susceptible of being rendered weaker by the consideration of any facts operating in the character of *infirmative* facts. But the infirmative facts capable of applying to it are of the same nature as those which have been seen applying to the case of possession of *real* evidence at large, when considered in respect of the criminative force with which it is capable of operating.

So far as concerns clandestine introduction, (so it exceed not a certain magnitude,) a mass of written evidence possesses a means peculiar

to itself for being introduced into a man's possession without his consent or privity. It may have come, for example, by the post, addressed to himself: it may have come by the post addressed to some inmate of his, and thus remain in his possession for any length of time without his knowledge.

“On such an occasion” (naming it), “my dear friend, you failed in your enterprise;” an enterprise (describing it by allusion) of theft, robbery, murder, treason: “on such a day, do so and so, and you will succeed.” In this way, so far as possession of criminative written evidence amounts to crimination, it is in the power of any one man to make circumstantial evidence of criminality in any shape, against any other.

It has perhaps very seldom happened that written evidence, tending to criminate a man in respect of the crimes in question, has been found in his possession, but there has been good and sufficient reason for regarding him as guilty. But, in these same cases, the principal reason has been constituted, not by this of possession, but by similitude of hands, or by other evidence.

Supposed facts that belong not to this head are apt to be urged in the character of infirmative facts, for the purpose of encountering the criminative circumstantial evidence constituted by possession of written evidence of the nature here in question. Such are,

1. Irrelevancy of the discourse, either with reference to delinquency in general, or with reference to the particular species of delinquency, or individual act of supposed delinquency, in question.

2. Unauthenticity of the script purporting to be in the hand-writing of the supposed delinquent.*

SECT. IV. — *Of interrogation, as an instrument for supplying the deficiencies of Real Evidence.*

IN the character of criminative evidences, besides the special and contingent infirmities to which they are respectively liable, the several mute evidences which compose the subject of this chapter have, as such, several infirmities in common. 1. The indications they afford are particularly apt to be incomplete. By written evidence, to which it happens to be found in the possession of the supposed delinquent, the lights afforded may be to any degree broken, imperfect, inconclusive. 2. From the intrinsic nature of these mute evidences, by which their criminative force is exposed to the opposition of so many infirmative facts, arises the question—a question that forces itself upon every rational mind,—these several possible infirmative facts, in the individual case in question, have they, or any of them, actually had place?

For filling up the above-mentioned deficiencies, for clearing up these last-mentioned doubts, the nature of things has provided one and the same natural and naturally efficacious instrument — *interrogation*.

On this, as on all other occasions, the way to know is to inquire: a proposition that from the beginning of the world to the present day has never been a secret to any human being, unless it be to English lawyers. And of whom

* See Book VII AUTHENTICATION.

to inquire? Of whom, but of the one person in the world, who, if the fact be in existence, cannot fail to know of it?—the one person in the world, in comparison with whose evidence every other imaginable species of evidence, direct or circumstantial (except in so far as this naturally best evidence happens by the force of sinister motives to be driven into mendacity), is a miserable makeshift: insomuch that if, on the score of hardship to the person so interrogated, there were any rational objection capable of applying to the extraction of the evidence from this most direct, and (in case of confessorial responsion) most trustworthy, of all sources, — it would operate, and with augmented force, to the exclusion of all other evidence.

The case in which the written evidence is confessorial, as compared with the case in which it is extraneous, here presents a difference. In the case of confessorial written evidence, the author of the writing and the possessor of it are but one person: there is not, therefore, of necessity more than one person of whom to *inquire* concerning it. In the case of extraneous written evidence, there are at least two persons: the person in whose possession it is supposed to be, and the person whose writing it is supposed to be. These two at the least: add to whom (in the case of a script purporting or supposed to be a transcript, or written from dictation), the original writer or dictator, on the one hand; the transcriber or amanuensis, on the other.

Of these two persons, the possessor and the writer (dismissing, for simplicity's sake, the ac-

cidental decomposition of the writer into the original and the derivative writer as above), it may happen to the latter to be no longer forthcoming in such sort as to be subject to inquiry: death, imbecility, or expatriation, may have put him out of reach. In this case, the imperfect evidence which to false science and blind prejudice has been the object of exclusive choice, is left by necessity in the character of the only receivable, because the only obtainable, evidence from that same source.

But, in the case of confessorial evidence, where the possessor of the evidence and the writer are one and the same person, if he be also the defendant, and in that character forthcoming, this first resource, the faculty of inquiring, remains accessible.

On this same occasion, there remains in both the above cases yet another sort of person, who, when the process of inquiry is going on, ought not to pass unheeded. This is the person, whosoever he may be (in the ordinary course of things, an official person), by whose instrumentality the papers, which it was so much the interest of other persons to conceal, have been brought under the eye of justice. The papers produced in the character of criminative evidence, whether confessorial or extraneous, are all genuine. Be it so:—but the papers which thus are produced, are they all the papers that, in the character of evidence in relation to this same supposed delinquency, could have been produced? These are criminative: but did the same possession, or any other within the reach of the searchers, afford no others that were exculpative? These are questions which com-

mon sense, in aid of common probity, cannot fail of pressing upon the minds of all parties concerned ; but to which the system of English procedure affords no adequate and all-comprehensive means of obtaining answers.

In pursuance of one of the most mischievous conceits that ever entered into a lawyer's head—one of the most absurd if justice, one of the best imagined if injustice, were the object; the above sources of necessary explanation have in great measure been cut off: and always to the prejudice of justice, on whichever side of the cause seated.

By the responsive testimony of the defendant, the existence of the *criminative* fact cannot be established, nor the clouds that hung over it be cleared up, because no man is to be compelled to accuse himself.

By the responsive judicial testimony of the same person, neither can the existence of any of the above-mentioned *infirmative* facts be established, nor the clouds that hung over it be cleared up; because no man is to be a witness in his own cause.

If it were by a plaintiff in the cause that a mass of evidences,—partly inculpative, partly infirmative with relation to the criminative facts, or in any other way exculpative,—were discovered and made forthcoming; he produces what he pleases, he suppresses what he pleases: master at the same time of an accusation and a defence, he produces the accusation, he suppresses the defence. Why?—because no man is, with or against his will, to be a witness in his own cause.

Of these mischievous maxims, the breach

is as notorious and perhaps as extensive as the observance ; but, broken as they are, there remains force in them to do mischief in deplorable abundance, as well by their application to this topic, as to a multitude of others.*

SECT. V. — *Forgery of Real Evidence.*

WHEN the appearance of things leads to wrong conclusions, the deceit will sometimes be the pure work of nature, at other times the work of human artifice.

The former case is exemplified but seldom ; when it is, its birth may, in the language in use among naturalists, be ascribed to the play of nature.

The irrational animals may be ranked, and to this purpose without injury, in the class of *things*. A case which, whether real or fictitious, is famous in the history of French jurisprudence, may serve for illustration to an English eye. There, as elsewhere, magpies have been remarked for a propensity to pick up and hide not food only, but other articles, though of a nature not applicable by these hoarders to any ascertainable use. An innocent person was accused of stealing from the house of a neighbour several pieces of gold, and, being convicted, suffered an ignominious death. The real thief was a magpie, which, without the privity of its master, had taken the money at different times, piece by piece, from the too accessible hoard of a neighbour, and deposited it in a place inac-

* See Book IX. EXCLUSION. Part IV. VEXATION. Chap. 3. Self-disserving Evidence.

cessible to any other than the unfortunate person who suffered as for stealing it.

When the deceit is the work of art—has human artifice for its cause—it may be ranked with *forgery*: the act by which deceit is produced, or endeavoured to be produced, may be termed *forgery of real evidence*.*

In another, though a nearly related, point of view, forgery of real evidence is to real evidence, what subornation is to personal: it is an attempt to pervert and corrupt the nature of things, of real objects, and thus force them to speak false. Of themselves the things are silent, or, if they speak, speak to the inculpation of the defendant: by the force he applies, a thing that was silent is made to depose falsely; a thing that was speaking against him is either made to speak in his favour, or at least put to silence.

As well in the case of real evidence as in the case of written evidence, forgery is susceptible of one main distinction—into *fabricative* and *obliterative*. The case where, in the employment of expedients of this kind, the endeavour of the criminal is simply to remove the imputation from himself, without seeking to fasten it on any body else, is as common as the other case is rare.

* In some cases, this species of fraud (the deceptitious fabrication, obliteration, or alteration, of the appearances presented by a natural body) constitutes a substantive independent offence of itself—forgery of which *writing* of any kind is the subject-matter or the object—forgery of which general *money* of any sort, the general medium of exchange, is the subject-matter or the object: of these modifications of the more extensive species of deception—forgery in regard to real evidence in general—the subject-matter has been already touched upon under the head of Pre-appointed Real Evidence.

Whatever be the crime, a main object of the endeavour of the criminal is of course to expunge, as effectually as possible, all traces of the commission of it. The hands, the garments of the murderer, have they received a stain from the blood of the deceased? The most obvious reflection suggests the removing the stain from every thing from which it can be removed, and the destroying or hiding any thing from which it cannot be removed. To superinduce upon any object an appearance, the tendency of which shall be to disprove the commission of the crime,—whether by disproving the existence of the criminal act or some criminative circumstance, or by proving the existence of some justificative, or extenuative, or exemptive, circumstance;—an artifice of this tendency would suppose an ulterior degree of refinement, and would come under the denomination of *fabri-cative* forgery of real evidence.

As it is only through the medium of physical facts that psychological facts can be brought to view, it is, consequently, through the medium of physical facts alone, that any deceptitious representation of psychological facts can be conveyed. Physical facts alone, and not psychological facts, are the only one of the two sorts of facts upon and in respect of which forgery can, properly speaking, be committed—to which the operations indicated by the term forgery can bear any direct and immediate application.

As to physical facts; although, among the several modifications of which real evidence of the *evanescent* kind is susceptible—evidence consisting of motions, sounds, colours, smells,

tastes, and (if the word may be used) *touches*,—there is not perhaps a single article that has not, at one time or other, been taken for the subject of that sort of deceptitious operation which, applied to other subjects, has received the name of *forgery*; yet it is among the modifications of *permanent* real evidence that we are to look for that modification of forgery which is most in use, most readily apprehended, and most apt to present itself under that name.

The beautiful history of the patriarch Joseph will afford us one exemplification of forgery respecting real evidence. Preparatory to the affectionate forgiveness he meditated to extend to his brethren, his plan required that an alarm should be raised in their guilty bosoms: an apprehension of being punished, not indeed for the barbarity of which he had formerly been the victim, but for a supposed offence of recent date, of which they were altogether innocent. In this view it was, that, into one of the sacks that had been filled with the corn which they had been buying, he caused a cup to be introduced, which, not having bought it, they had never meant to take. Here then we have an example of forgery of real evidence of theft; forgery of real evidence of the permanent kind:—forgery of evidence presented by the permanent situation of a certain material object, a certain real body, principal object and subject-matter of the supposed theft, the imputation of which it was intended thus to fix upon them, though for a time only, and for a generous and friendly purpose.

Another example may be afforded by the modern case of Captain Donnellan. The smell

afforded by the laurel-water, the poison supposed to have been employed by him as the instrument of death,—this important phenomenon, susceptible of permanence in respect of the substance itself and its odorous power, evanescent when considered in respect of the sensations of which, on any given occasion, it might have been productive,—was, at any rate (so long as the phial continued impregnated with it), a lot of real evidence: a lot of evidence indicative, at once, of the physical act by which the poison was applied to the organs of the patient; of the intention, the murderous intention, in pursuance of which these acts were performed; and of the criminal consciousness with which that intention was accompanied. Conscious of all these facts, as well as of the punishment annexed by law to such crimes, Donnellan, on observing how the phial had become the subject of observation, took it up, and, with the apparent view of doing away the instructive smell, poured water into it, and rinsed it out. The forgery thus actually committed was of the kind that has been distinguished by the name of *obliterative*. Suppose now that, instead of simply clearing the phial of the existing smell, it had been his plan, for further security, to superinduce another; the smell, for instance, of some highly-scented medicine, such as would have been suitable to the patient's case: *fabricative* forgery would thus have been added to *obliterative*.

In the case where guilt, guilt on the part of the forger, really exists,—the inculpative fact, of which the act in question operates as evidence, is a psychological fact—the existence

of culpable consciousness — consciousness that the act, whereby the effect is intended to be produced, is of the number of those which stand proscribed by one at least of the two guardian sanctions, the political and the moral, if not by both.

The presumption thus afforded by this species of circumstantial evidence, — the presumption of correspondent delinquency, — is obviously a strong one; it is, however, far from being a conclusive one. Cases, supposable cases, are not wanting, in which (supposing them realised) the failure of the presumption, the erroneousness of the inference, will be obvious and indisputable; nor are instances wanting in which these several supposable cases have been exemplified in real life.

1. Forgery (exculpatory) in self-defence against a false accusation; forgery having for its object the removal of appearances tending to fasten the imputation of delinquency upon an individual really innocent. The party in question being innocent, — suppose at the same time a number of natural appearances tending to induce a persuasion of his being guilty. Take away the pre-existing source of deception, the forgery in question is true evidence of guilt: add the pre-existing source of deception, — the forgery by which the deception from this source is endeavoured to be done away, is, in the character of evidence of guilt, fallacious.

No system of established procedure is yet known that does not afford instances — instances in greater numbers than an eye of sensibility can contemplate without concern and apprehension, — where individuals, really inno-

cent, have sunk under a load of imputation heaped upon them by fallacious circumstantial evidence. Suppose an article of this description, pregnant with false inferences,—an article exhibiting appearances susceptible of permanence:—the dagger employed by a murderer, conveyed into the pocket of an innocent man; the garment of an innocent man stained, by design or accident, with blood from the body of a man who has been murdered. Suppose the innocent man detected in his endeavours to rid himself of the dagger, to wash away the blood: the dagger, the blood, fallacious as they are, are, notwithstanding, evidence: these endeavours, innocent as they are, will accordingly be, in appearance at any rate, and in a certain sense in reality, forgery of real evidence.

The case of the unfortunate Calas affords an exemplification of more than one of the incidents by which the conclusiveness of an inculpativè presumption may be proved. A son of his had received a violent death from his own hands: the father was brought to trial on a charge of murdering the son. As far as the confusion of mind into which he was plunged permitted, he had obliterated or changed some of the appearances about the body of the deceased, and other circumjacent bodies: here was forgery of real evidence. On his examination, he denied some of the facts by which the non-naturality of the death was indicated: in this mode, as in the former, he concealed—not indeed the fatal act itself, the act by which the process of strangulation was effected (for in that he had neither part nor privy),—but some of the evidentiary facts by which it was indi-

cated : here was clandestinity. To what end all these aberrations from the line of truth ?—to cover guilt ?—no ; for there was none any where. The object was to save the reputation of his departed child, and thereby the reputation of the family, from the ignominy which, had the direct truth been known, would (he was but too well assured) be stamped upon it by a most mischievous and endemial prejudice.*

2. Forgery (inculpative) acted in sport : forgery committed in endeavouring, for a sportive purpose, to fasten upon an innocent person the imputation of delinquency in this or that shape for a time.†

In the story already referred to, the story of Joseph and his brethren, we may find an exemplification of this case ; though the sport was there not of the mirthful, but of the serious and moral—not of the comic, but of the tragic kind. Suppose the patriarch, — minister as he was to an absolute king, — suppose him,

* Whether, in the case in question, the several above-distinguished modifications of innocent deception did actually take place, would be a scrutiny foreign to the purpose. Some, indisputably ; not all, possibly : but the inquiry would be completely useless, since, correct or not correct, the statement answers, in equal degree, the purpose of illustration. What is material is—the circumstances in it (if any) that are false, are, in any future case, just as likely to be exemplified as if they had been true.

† If the endeavour be a serious one — an endeavour to cause an innocent person to suffer ultimately as for a delinquency, of which, to the knowledge of the forger, he is not guilty ; the act directed by this intention, and accompanied by this consciousness, constitutes a substantive offence, and the presumption of delinquency afforded by the forgery is by the supposition not fallacious.

notwithstanding, amenable to the ordinary dispensations of justice: suppose his fraternal and generous project observed, and mistaken for a serious hostile one:—the ultimate innocence of intention would, when demonstrated, have been sufficient to repel the presumption afforded by the apparent indications of a design deceptitious and injurious, and to add to the instances by which it is proved that, in the character of inculpativ evidence, this, any more than any other species of evidence, is never entirely exempt from the danger of proving fallacious.

Penal justice is not the only theatre of a fraud of this complexion: it is equally applicable to non-penal cases. It may have for its object the subjecting a man to punishment, or to the burthen of making satisfaction, when undue: it may have for its object the exempting a man from punishment when due: it may equally have for its object the causing a man to be put into possession of some right to which he has no just claim: it may have for its object the exempting a man from some obligation, which, as necessary to the collation of a correspondent right, some other person has a just claim to see imposed upon him.

The clandestine removal of a land-mark affords an example of a case of forgery of real evidence, having for its object the acquisition of a proprietary right. Considered in respect of its most obvious and most frequent motive and efficient cause, it is a contrivance for stealing land: it is a succedaneum to the forgery of a deed, designed to serve as evidence of a title to land. Considered as the act of a

person to whom the loss would not be productive of any profit, it would at any rate be a contrivance for injuring a person in his property, by *destroying* his title to land.

By the foregoing theoretic views, a few practical instructions are obviously suggested.

The first is, that it is an office incumbent on the legislator, and, under his authority and guidance, on the judge, — whenever any material objects present themselves as capable of affording real evidence in the cause (be it penal, be it non-penal), — to take such measures as may be suitable to the nature of the case, for securing their continuance in that state in which they shall be *still* exhibitiv of the evidence which they appeared to exhibit at the time of their being *first* observed; and to prevent them from either passing of themselves, or being purposely or accidentally brought, into any other state, in which the evidence exhibited by them might be in danger of proving fallacious.

The attention bestowed upon this object, is, in the French law, particularly conspicuous: more so than in the English. In the former, the judge has general explicit duties presented to him, and explicit rules for his guidance, with commensurate powers. In the English law, no special powers extensive enough to embrace the object are possessed by any magistrate; and in the exercise of his powers, so far as they happen to be adequate, he is left to his own unassisted discretion, without any instruction for his guidance.

Before any suspicion has arisen, — before any steps have been taken, in the view of bringing

the delinquent to justice, — the field for this species of forgery is open to him; and no provisions taken by the legislator can be of any use, the moment for making application of them not being yet come. But as soon as suspicion has told her tale to justice, and the servants of justice have been put upon the search for evidence, then it is that things as well as persons may in this view be fit objects of their care.

2. Another subject for the consideration at least of the legislator, is, the putting (where practicable) this species of forgery, under its several applications, upon the same footing in respect of prohibition and punishment, as forgery of written evidence, when directed to the same ends.

By the compilers of the books of Romano-German law, Prussian* as well as Austrian,† removal of land-marks constitutes an independent species of delinquency, under a title by itself, not referred to fraud, the *crimen falsi*, or any other genus. Under the same denomination, mention had been found to be made of it in the original books of ancient Roman law.‡ This, it is evident, is a case of forgery of real evidence, in which the oblitative and the fabricative species are combined. In so far as the designation that had been given of the real boundary is done away by it, it is *oblitative*; in so far as an indication of a false boundary is presented, by setting the mark down again in a wrong place, it is *fabricative*.

In this spot, and in this alone, the penal law

* Boehmer, Sect. II. Cap. 33. † Banniza, § 464—471.

‡ Heineccii Elem. Pars VII. § 149.

of these two German states has covered a portion, important indeed in its nature, but comparatively minute in its extent, of the wide field of this modification of forgery.

Neither the English nor the old French law have made so much as this small advance towards the comprehension of this fraud. The French, in their adoption of the Roman law, seem somehow or other to have dropt what the more faithful Germans have copied.

In French jurisprudence, however, instances are not wanting of the application, real as well as suspected, of this species of fraud, to the most mischievous and flagitious purposes.

In the case of Le Brun,* who died of the torture that had been unjustly inflicted on him for his supposed participation in the murder of his mistress, the judicial officers, when possession had been taken of an old key that had been in his occupation, were charged by his advocates with having altered it into a master-key, for the purpose of his appearing to possess a facility, which in fact he did not possess, for the commission of the crime.

Under the Roman law, the word *stellionatus* served as a head to comprise a hodge-podge of offences, chiefly of the predatory class, bearing scarce any other resemblance to each other. Out of six, the third is *si quis imposturam faciet in necem alterius*—if any one shall have employed imposition in the view of depriving another of his life. Under this head, forgery of real evidence for that particular purpose may probably have been meant to be comprised.

* Causes Célèbres, iii. 323.

A lizard is a cunning animal, and a *stellio* is the most cunning of all the lizards, as Pliny, the most accurate of natural historians, assures us. It is upon the ground of this anecdote of natural history, that the Roman lawyers have jumbled together so many other offences which require no contrivance, under the name of *stellionatus*. *Stellionatus* should, by this description of it, have been synonymous to fraud, or been used to express exclusively some modification of fraud.

CHAPTER IV.

OF PREPARATIONS, ATTEMPTS, DECLARATIONS OF INTENTION, AND THREATS, CONSIDERED AS AFFORDING EVIDENCE OF DELINQUENCY.

SECT. I.—*Probative force of these circumstances, considered in themselves.*

I. PREPARATIONS :—viz. acts done in the intention of giving birth to the act considered as the principal fact, the fact said to be evidenced.

The event having actually taken place; if the acts considered as preparations with regard to that event were such as properly come under that name, their probative force with reference to it is out of dispute, and they are assumed to be conclusive.

Of acts of this description, and those others that follow them under the same more extensive denomination of precedential acts, it may be of use at the outset to observe, that,—although in point of time the acts themselves are essentially prior to the principal act or other fact,—it will frequently happen, that the time when they are understood to be such, the time when their connexion with the principal fact is perceived, and even the time when they themselves come to light, is

of later date.* That it should be so is the more natural, inasmuch as, — if the design, being of a criminal or in other respects an obnoxious nature, is *understood* (or though it be but *suspected*), — a natural though not a necessary result is, that it should be frustrated: that the obnoxious event should be prevented from taking place.

It is in the penal law that acts of this description have been most frequently brought to notice: the purchasing, the collecting, the fashioning, the instruments of mischief; the repairing to the spot destined to be the scene of it.

Not that the facts which are apt to come in question in a non-penal cause are in their nature by any means destitute of this species of circumstantial evidence. 1. Preparations for the ceremony of interment have been brought forward as circumstantial evidence of expected, though more naturally of precedent, death; most commonly to prove a death which really took place: rarely, but not without example, to afford a fallacious proof of the death of a person at that time still in existence.† 2. Preparations for birth (*i. e.* for parturition) have been brought forward, sometimes to repel the charge or suspicion of the destruction of an illegitimate child by the mother; sometimes to afford proof of filiation, real or pretended. 3. Preparations for the marriage ceremony have been brought forward, sometimes as presumptive proof of the subsequent performance of the ceremony; sometimes as proof of an engagement to that

* An example will be seen further on, in Donnellan's case.

† See Causes Célèbres.

effect, when satisfaction for the breach of it has been claimed.*

When the act projected is of a criminal nature, or where on any other account the discovery of the design threatens to be followed either by the frustration of it, or by any other inconvenience, either to the agent in question, or to any other person or persons, whose welfare is regarded by him with an eye of sympathy; the natural state of things is, that the preparations should be endeavoured to be concealed. Understand, the preparations for bringing about the event which is particularly and for its own sake endeavoured to be brought about. But in this main and direct design, are involved by accident a various and almost indeterminate multitude of incidental and collateral ones: 1. Preparations for giving birth to productive or facilitating causes, of all kinds and degrees of propinquity or remoteness; for removing obstructions of all kinds from all quarters, and, among others, for obviating suspicion of the design itself: 2. Preparations as it were of the second order, for preventing discovery or suspicion of the preparations of the first order, viz. of those which are pointed most immediately to

* In the cases where the act has not been intended, or the event not expected, the preparations, being employed as instruments of deception, have been tinged with that species of fraud which has, on a former occasion, been distinguished by the name of *forgery of real evidence*: a deception which, though the object of it is to disguise or suppress genuine evidence, becomes itself evidence when discovered, but evidence on the other side. Every species of deception, which, if successful, would have produced evidence on the side of the deceiver, operates as evidence against him in case of ill success.

the accomplishment of the principal design. 3. To these preparations of the second order, imagination will easily add preparations of the third and fourth order, and so on. For it is evident, that to this chain of preparations—to the chain of eventual or intended causes, capable of being thus spun out of the stores of wayward industry—there can be no certain limit.

The measures thus taken for concealment or illusion,—for involving facts in darkness, or covering them with false colours,—will sometimes appear in the form of *discourse*, oral or written; sometimes in the shape of *deportment*, physical acts at large. Whatever a man does, he does either by his own hands, by his own immediate operative powers, or by the hands of others. When he gives motion to the hands of others, it will generally be by words. So, if the hands or the lips of others be prevented from raising up obstructions to his designs: and, among the persons thus wrought upon,—the persons prevented from becoming or continuing to act in the character of opponents, or converted into coadjutors,—may be the intended sufferer himself.

On March 30th, 1781, at the assizes at Warwick, Capt. Donnellan was convicted of murder, committed by poisoning sir Theodosius Boughton, in whose estates he had an interest in right of his wife. Under the present as well as several succeeding heads, this case will be found pregnant with a variety of instructive illustrations. The determination was formed, that, in some way or other, the death of the young man should take place. To shut the door against suspicion, a notion was to be propagated, that his state of

health was desperate; that death — speedy death — was certain; that his imprudence was continually heaping up causes upon causes.* The poison employed was distilled laurel water. The plant was to be found of course in the garden; and the murderer, not to have poison to buy, had provided himself with a still for the fabrication of it. He practised distillation frequently; and the room in which he operated was kept by him locked up.† The young man had a trifling complaint, for which he was taking medicine: the contents of one of the phials were to be got rid of, and the poison substituted. The phials, as they came in, used to be placed by him in an inner room, which he had been in the habit of locking up. He happened once to forget to take his medicine. “Why” (says Donnellan) “don’t you set it in your outer room? you would not then be so apt to forget it.” — The fatal advice was taken: and thus the necessary opportunity was *prepared*.

Preparations capable of a specific description are frequently and properly made the subject of a separate prohibition; — converted into distinct offences.

Where the connexion between any such preparatory act and its correspondent principal act is looked upon as sufficiently intimate; where the existence of the former is looked upon as sufficiently *conclusive* with regard to the existence of the latter; the vigilance of the legislator has not uncommonly exercised itself in laying hold of the preparatory act, and converting it, by his prohibition and punishment, into a

* Trial, pp. 18, 20.

† Ib. p. 41.

separate offence: instead of taking the chance of the judge being able to treat it upon the footing of an evidentiary act, with reference to the corresponding principal act, and so bringing it within the punishment already attached to such principal act. Forgery, coining, but, above all, smuggling, afford so many instances of this line of legislative practice.* Under the head of Indirect Legislation, it has been brought to notice in another place.†

To an operation of this sort an objection presents itself, which, when it is not conclusive as a bar, may at any rate be useful as a caution. Such an operation, it may be said, will be either useless or mischievous: useless, if the effect of it be not to cause a man to be convicted of the offence in a case where otherwise he could not have been convicted; mischievous, in the opposite case. To the judge alone it belongs to be informed of the circumstances of each individual case; to the legislator, not. If, in any given instance, to him who is thus informed of those circumstances, the evidentiary act, even with the addition of whatever other evidence the case may happen to furnish, does not appear to afford a sufficient ground for pronouncing the existence of the principal act; the operation of the legislator,—the obligation which he lays on the judge to act as if the ground were sufficient,—is an act of injustice: it is productive of punishment where

* On this principle, for the more effectual prevention of the crime which consists in the murder of an illegitimate child, a punishment has been imposed by English law upon the mere concealment of the birth: an act in itself nowise criminal, but considered in the light of evidence of a criminal intention.

† Dumont, *Traité de Législation*, iii. 119.

not due:—and, in the only remaining case, justice, at any rate, does not gain by it.

To this objection three answers may be applied.

1. In the first place; the act of the legislator,—the act whereby the prohibition is issued, together with its punishment,—is (as such) prior in its date to the occasion by which any act in disobedience of it can be produced. The subject has complete and effectual warning of it: (for, if not, the answer, it must be confessed, does not apply): the subject has complete warning of the prohibition put upon the newly-prohibited act, the formerly unprohibited and amply evidentiary act; and the abstaining from it is as much in his power as the abstaining from the principal act. If indeed the law,—instead of being a law precedent to the offence, a law issued with the ordinary precedent notice,—were a law subsequent to the offence;—were, in a word, in the language of English jurisprudence, and after the fashion of every decision of jurisprudence in a new case, that monster of iniquity an *ex post facto* law;—then, indeed, the objection would be not only applicable, but unanswerable. But this is not supposed to be the case.

2. In the next place; the more effectually to secure innocence from the punishment levelled against guilt; when an act that accidentally might now and then, in the character of an evidentiary act, have involved the agent in the punishment appertaining to the principal act,—when such an act is taken in hand by the legislator, and converted into a principal and independent offence,—care ought to be, and com-

monly is, taken, to interweave in the description of the new-created offence, explanations, serving to limit it, and make sure of confining the application of the punishment to the case where the quondam evidentiary act, the supposed act of preparation, is really such:—is really connected in the mind of the agent with the intention of committing the principal act.

3. In the third and last place; to the last-mentioned precaution may be, and not unfrequently is, added another, viz. the reducing to a degree below that of the original or principal offence, the punishment annexed to the evidentiary, the new-created offence. Instances of this sort, in no inconsiderable number and variety, would probably be found in the laws of all countries relative to smuggling: they certainly are to be found in the British laws relative to that multifariously-diversified species of offence.

What has been said of preparations may apply, with little variation, to *attempts*; since,—with reference to the ultimate object of intention, the ultimate result,—all attempts, all motions previous to consummation, may be considered as preparations. By attempt, we understand, action, carried beyond mere preparation, but falling short of execution of the ultimate design, in any part of it.

Between preparations and attempts, the distinction will (it is evident) be, in many cases, very indeterminate; and in different cases it will be widely different. In penal cases, it will be different according to the nature of the species of offence: in offences of the same species, it will be different again, according to the different circumstances in which, the dif-

ferent means by which, the individual offence in question is endeavoured to be committed. In case of homicide, for example,—according as the intended scene is laid on shipboard or by land; on the public way or in a private chamber; by drowning, fire-arms, or poison.

Fortunately, on the present occasion, these distinctions are as useless, as, on any occasion, they would be nice and intricate. So the ultimate design be evidenced, whether the act by which it is evidenced come under the denomination of an attempt, or only of an act of preparation, makes in this respect no difference.

II. Second example of circumstantial evidence decidedly precedent to the fact evidenced, *declarations of intention*:—of the intention to perform the act, the performance of which constitutes the principal fact, the fact evidenced, as above.

This species of circumstantial evidence bears a close analogy to the foregoing. Declarations of intention are expressions of intention purposely conveyed by words: by preparations, purposely or not, the intention is expressed by acts. The former belong to the head of personal evidence by discourse; the latter to that of personal evidence by deportment.

III. Threatening, or menacement. A threat, an act of menacement, is a name given to a declaration of intention, in the case where the act declared to be intended is of the number of those of which it is supposed that the effects would be of a painful nature, with reference to the person to whom the declaration is addressed.

The reason for giving to a declaration of intention in this case a separate mention under

a separate name, is, that it necessarily assumes a separate name in every system of penal law; inasmuch as, where the *act* declared to be intended is considered and treated as an offence, so is (or at any rate, in cases of a certain degree of importance, so ought to be) the *declaration* likewise.

A declaration to this effect may be expressed by any other signs as well as by words. Preparations, when open, may have for a collateral object this collateral result.

It matters not whether the threat be addressed immediately to the person on whose mind the unpleasant impression is intended (or declared to be intended) to be made,—or to any other person or persons, to the intent that, in one way or other, at some time or other, it may reach his notice. In a word, if it be in the shape of a discourse, oral or written, that the threat is meant to be conveyed, it matters not whether he be mentioned in the second person or the third.

For the reason given above, menacement is presumptive evidence of the act; *i. e.* that it was by or with the co-operation of the threatener that the act was done: but, for the reason also given above, the evidence is not of itself absolutely conclusive.

SECT. II.—*Infirmative circumstances applicable.*

I. *Preparations and attempts* :* infirmative circumstances applicable to them.

* In some cases the *preparation* and the *attempt* will be clearly distinguishable, but in others they will not. To the

These circumstances have been already considered in the character of criminative circumstances, evidentiary of the part supposed to have been taken by the supposed delinquent in the production of the noxious result.

Remain to be brought to view the several possible facts by which, in the character of infirmative facts, their probative force, in regard to the part supposed to have been taken by him, is capable of being diminished.

1. *Intention different ab initio*;* in which case, the result intended to be produced may have been either, 1. altogether innoxious; † 2. less noxious than the result that ac-

present purpose, at any rate, they may be brought together under one head : in respect to the infirmative facts capable of applying to them, there will not be found any difference.

* In this case (it may be objected) the fact is not, properly speaking, an infirmative one. By pleading it, a man would not (as in the other cases that have been seen) *admit*, he would on the contrary *deny*, the existence of the inculpativ fact in question. True: the preparation or attempt was not a preparation or attempt to produce exactly the same result that, in consequence, is understood to have taken place ; but it was, however, a preparation, an attempt, to do something ; and a preparation or attempt of which the mischief in question has been the result. A man is killed by a bullet, shot out of a fowling-piece : whether the intention was to kill or not to kill, suppose the supposed delinquent were, a little before, seen putting a bullet into the fowling-piece, the preparation thus made would not be the less likely or the less fit to be considered in the light of an evidentiary circumstance, probabilizing the intention of producing the mischievous result that actually took place.

† See Donnellan's case. Crime—murder, poisoning by water distilled from laurel leaves : criminative fact—preparation for distilling : infirmative supposition—it might have been for water from rose or other leaves ; and such was the colour endeavoured to be given to it.

tually took place; or, 3. equally or more noxious.*

2. *Intention overshot by the result.* But in this case the disprobabilizing, the infirmative force of the infirmative fact, applies, not to the whole of the result, but only to the excess of the result produced over the result intended.†

* It is only in the character of an infirmative supposition applicable to a criminative evidentiary circumstance, that the state of things here supposed applies to the present purpose. What, on the supposition that the consummation of the act of delinquency is sufficiently proved by the help of ulterior evidence, may be the proper relative quantity of punishment (relation being had to the more ordinary case, of an exact conformity, between the criminal intention and the noxious result), is a question that belongs to another place. On this point see "Introduction to Morals and Legislation."

In the State Trials may be seen a trial for maiming, in which the defence was, that the maiming was unintentional, the design being manifestly to kill, for that maiming would not answer the purpose. Conviction took place notwithstanding; it is difficult to say whether properly or not: the indictment being grounded on unwritten law, under which neither right nor wrong can have any determinate place. Under the statute law, — where the intention has been equally or more noxious than the result, there will be no difficulty in saying that the punishment allowed to be inflicted ought to be at least equally great, because, in resolving the mischief of the offence into its component elements (viz. into the mischief of the first order, viz. that which falls on the individual specially injured and his immediate connexions, and the mischief of the second order, viz. the alarm and the danger extending to the community), it will be found that the aggregate mischief, and thence the demand for punishment, is not, in this anomalous and extraordinary case, inferior to what it is in the ordinary case. (See Dumont, and "Introduction," &c. *ut supra*.)

† Among a number of considerations, each of which would of itself be sufficient for the abolition of the savage practice of confounding homicide on the occasion of a duel in consequence of mutual consent, with homicide in the way of

3. *The intention changed*; viz. at a time posterior to the attempt or course of preparation, which, being proved, is exhibited in the character of a probabilizing circumstance, evidentiary (as against the supposed delinquent) of a participation in the production of the mischief. Here, as above, it is only on the supposition of the fresh design's being less mischievous than the original one, that the possibility of the infirmative fact in question can have (or at least ought to have) any influence in practice.

4. *Intention persisting, power failing*: the result, though intended to be produced by the supposed delinquent, having in fact been produced, not by any act of his, but by other means.*

5. Among co-delinquents, *the operation of the immediate criminal agent varying from the common design* agreed on. This, a case frequently exemplified, includes the three first cases, being distinguished by no other circumstance than that of the number of the offenders.

Two or three engage in a plan of robbery: one of them, in prosecution of the design, commits a murder, on his part intentional, but

assassination, one is, that in general the result intended is not death, but only disablement; and the proof is, that no sooner has the disablement taken place, than hostility ceases.

* See Bradford's case, in a Treatise on Circumstantial Evidence, occasioned by Donnellan's trial. Bradford being an innkeeper, a traveller, seen to be well provided with money, put up at his house. The traveller was found weltering in his blood, Bradford in the room, armed as for the crime: he had, however, been frustrated by another traveller, with whom he had had no intercourse on the subject, and who on his death-bed confessed the fact.

not necessary to the design. Whether, in the intention of committing the greater crime, the accomplices in the lesser did or did not take part, is among the questions which (in a case of homicide on the occasion of a design of robbery) have been passed over as not worth notice by the unfeeling negligence of English judges.

In an early and rude state of society, the attention of those on whose will the fate of their fellow-creatures depends, has every where been almost exclusively pointed to physical facts, regardless of psychological ones. In the instance of the Chinese lawyers, Englishmen being the eventual or intended victims of it, this barbarity has attracted notice. But if, on this score, the first stone be due to the head of the Chinese lawyer, the second is, on a multitude of similar accounts, due to those of his learned brothers on the English bench.

II. *Declarations* or other expressions of *intention*: infirmative facts applicable.

To the criminative force of discourse expressive of an intention to commit an offence of the nature of that eventually committed, the supposable facts that apply in the character of infirmative considerations, are, in species and denomination, the same that have been seen applying in the case of preparations and attempts. But, forasmuch as words are apt to be uttered with less consideration than a course of preparation, attended with labour and hazard, is wont to be engaged and persevered in; the probative force of the criminative circumstance seems in general less considerable, and

at the same time the disprobative force of the infirmative consideration more considerable.

Being of the nature of confessorial evidence, viz. of that species of it which is extra-judicial and spontaneous, differing only in respect of relative time, (the confessorial evidence being subsequent to the event, the evidence here in question antecedent,) it stands exposed to the disprobative force of the same infirmative considerations as confessorial evidence, which see.*

1. If the state of things expressed in the former instance by the words *intention different ab initio* be exemplified here, this is as much as to say, that the declarations that have place here (viz. the declarations of an intention to commit the crime that in fact was afterwards committed) were false. Supposing such to be the case; the inferences that may be drawn from them, and the infirmative considerations that apply to their probative force in the character of criminative circumstances, are the same as in the case of *false extra-judicial and spontaneous confessorial evidence*, or *false response*, which see.†

The supposition that these declarations are false, may, at first view, be apt to appear inconsistent with the supposition all along made; viz. that the crime in question has actually been committed, and that *by whom* committed (or rather, whether committed by the supposed delinquent) is the only remaining subject of inquiry. But, whether the crime actually com-

* Vide infra, chap. 6.

† Chapters 5 and 6.

mitted by the supposition, had or had not the supposed delinquent for a sharer in it, — the declarations made of an intention to commit a crime of that or a similar description may, at the time when made, have been false: and declarations of an intention to commit a crime are no less susceptible of being false than declarations of the opposite cast, viz. declarations of an intention to abstain from the commission of that or a similar crime.

See Chapter 6, in which the various inducements by which a man may have been engaged to avow the commission of a crime, committed or not committed, are brought to view.

III. *Threats*: — infirmative considerations applicable.

To threaten to do a criminal act is to express an intention of committing it. The only difference is, that, when a man threatens to commit a crime, he not only expresses an intention of committing it, but declares this intention in the design that such his declaration should come to the knowledge, and be productive of fear in the mind, of some person in whose mind (if committed) he expects it would be productive of grief.

Of course, whatsoever infirmative considerations apply to declarations of intention taken at large (viz. declarations of an intention to commit the crime afterwards committed), apply to threats: viz. to threats bearing relation to the same crime. But in the case of threats, these infirmative considerations seem in some instances to apply with superior disprobative force.

In the case of threats, very commonly the

result really intended to be produced is,—not the mischief of the crime, nor, therefore, the crime itself, —but only the *apprehension* of it: the alarm, the terror naturally attendant on the *expectation* of it, — on the contemplation of it in the character of a mischief likely to take place. If so, it is in this way that the state of things expressed by the words *intention different ab initio* is here verified.

The consideration that contributes to render the falsehood of the declaration in question in this case probable, and consequently to weaken the probative force of this circumstance in the character of a circumstantial evidence of the imputed delinquency, as against the supposed delinquent, is, the tendency of such a prediction to obstruct and frustrate its own accomplishment. By threatening a man, you put him upon his guard; and force him to have recourse to such means of protection, as the force of the law, or any extra-judicial powers which he may have at command, may be capable of affording to him.

Whatever may be the disprobative force with which, in the character of an infirmative fact, this tendency on the part of an antecedent threat may operate in opposition to its probative (*viz.* to its criminative) force; the indication afforded by this infirmative consideration can never be peremptory and conclusive. By the testimony of experience, criminal threats are but too often, sooner or later, realised. To the intention of producing the terror, and nothing but the terror, succeeds, under favour of some special opportunity, or under the spur of some fresh provocation, the intention of producing the

mischief; and (in pursuance of that intention) the mischievous act.

Note that among the tendencies of menace-ment is that of operating at the same time as an evidence of an ulterior and distinguishable evidentiary fact; viz. operation of corresponding motives, existence of corresponding dispositions: permanent sources of the delinquency in question, in the instance of the supposed delinquent. As to this point, see further in an ensuing chapter.*

A question which may occasionally arise is, how far *mendacity* on the part of a witness may be considered as probabilized by evidence proving him to have previously *threatened* to prejudice by his testimony a party on a side opposite to that on which he is called: in particular, in a criminal case, to have threatened to give such testimony as should render certain, or more or less probable, the conviction of the defendant.

In this supposed circumstantial evidence of mendacity may be seen a very frequent source of delusion, and a very useful instrument in the hands of delinquents and their advocates.

If the threat be conditional, next to nothing is proved by it: if absolute, still less. "If you do not so and so as I would wish, I will testify against you." With superior and refined morality it certainly is not consistent for a man thus to render dependent on a compliance with his personal wishes a service which he owes to justice. But does it follow that, because,—out of court, and before you have been

* *Infra*, chap. 13.

called upon for your testimony by the official ministers of justice,—you reserve to yourself (or rather declare yourself to have reserved to yourself) the faculty of making or not making, as you think fit, the preliminary disclosure which may eventually lead to prosecution,—that therefore, if by the power of justice called upon for your testimony, you will perjure yourself?

A threat, however, of this kind,—though, taken by itself, it operates with very little force in the way of presumptive evidence of mendacity,—may be of considerable efficacy in corroboration of other circumstantial evidence to the same effect.

CHAPTER V.

OF NON-RESPONSION, AND FALSE, OR EVASIVE
RESPONSION, CONSIDERED AS AFFORDING
EVIDENCE OF DELINQUENCY.

I. FIRST article of that class of circumstantial evidence the nature of which is to present itself at a period of time subsequent to that of the principal fact, — *non-responsion judicial*: silence on the part of an individual (being a party to the cause) at the time of his being subjected to examination in due form of law: wilful forbearance to make answer, in the character of a deposing witness, to any relevant question put to him in the course of a judicial examination. In this case is involved the supposition of the establishment of the practice in question, in the instance of both parties, plaintiff and defendant, in both sorts of causes, penal and non-penal: and, in the supposition of the *establishment* of that practice, is again involved the supposition of the *propriety* of it; of the propriety of it, in the utmost latitude of which it is susceptible, as above. Is it then proper, and to an extent thus unlimited? Yes: and that for two sorts of reasons. In the first place, because the notions by which, in one of the four cases, (viz. that of the defendant in a cause of a penal nature,) it stands condemned,

are mere prejudices — groundless and utterly indefensible prejudices — conceits, founded not on the principle of utility, but solely on the principle of caprice: in the next place, because, in this case, as in the three others, the practice in question is the most powerful as well as the safest of all instruments that can be employed for the discovery of truth. The reasons in favour of the former of these positions will be exhibited under other heads:* the reasons which the latter has for its ground will now appear as we advance.

The fact of which this sort of behaviour operates as evidence — the conclusion to which it tends, the inference which it appears to warrant, — varies in its description, as already intimated, according to the quality of the cause, penal or non-penal, and the relation which the party, plaintiff or defendant, bears to it.

Case 1. — Let the cause be a penal one, and the person examined in the character of a witness, the defendant. In this case the conclusion will naturally be, that he is guilty of the offence of which he stands charged. Thus stands the proposition; the proof will be exhibited further on.

Case 2. — Let the cause be a non-penal one, and the party examined be the defendant, as before. The conclusion is of the same kind, varying only with the nature of the cause. The predicament he stands in is of the number of those in which a man stands bound by law to take upon him the obligation sought to be imposed upon him by the plaintiff's claim.

Case 3. — Let the cause be a penal one, as

* Vide Book IX. EXCLUSION.

before, but the party the plaintiff. In this case, if it be a cause purely penal, — the demand made by the plaintiff being purely the infliction of punishment, and that a punishment not including any effect of a nature to afford personal satisfaction to himself; as is the case where the plaintiff prosecutes for the public merely, in which case he is a public officer, acting without personal interest; in this case it cannot fall to the share of the plaintiff to be examined. If by accident (and it could happen only by accident) it did fall to his lot to be examined, wilful forbearance to answer is a result that can scarcely be supposed, it being difficult to suppose a motive that should engage him to it: and supposing it to take place, no conclusion can in the nature of the case be drawn from it. If the cause be of the mixed kind, in which a non-penal demand is combined with the penal one, — a demand of satisfaction for the benefit of the individual, with the demand for punishment to be inflicted for the benefit of the public, — in this case, so far as concerns the non-penal part of the demand, the case coincides with the case next following. The conclusion turns to the prejudice of the plaintiff, in the same way as we saw it turn to the prejudice of the defendant in the preceding non-penal case.

Case 4. — Cause, non-penal; party, the plaintiff, as before. Conclusion, the plaintiff's claim ill-founded: the defendant not in fact in that situation which it is necessary he should be in, to give legality to the demand made upon him by the plaintiff—the demand that he shall be compelled to submit to the obligation sought to be imposed upon him at the instance

of the plaintiff, the obligation correlative to the plaintiff's pretended right.

Now then as to the proof, the grounds, of the conclusion, that the party refusing to make answer to questions put to him by authority of justice, was in the wrong, in respect of the point in controversy in the cause. And, first, where the party in question is the defendant, and the cause a penal one.

1. Supposing him not guilty, such silence cannot but be detrimental to him: supposing him guilty, it cannot but be advantageous to him; that is to say, supposing the judge were to abstain from drawing the inference which no individual viewing the matter in the same point of view ever fails to draw, on the ground of the known principles of human nature and common sense.

To answer, one way or other, cannot but be in his power. No question whatever to which a man, any man whatsoever, is not able to make an intelligible answer of some sort. *Quest.* What do you know about this business? *Ans.* So and so: or, I know nothing about the matter. Whatever be the question, whosoever be the individual to whom it is propounded, an answer to one effect or the other may in every case be given by him. The answer may be true or false: if false, the case belongs to the head next considered.

The party is exposed to suspicion, to a strong and serious suspicion, of having been really guilty of the offence of which he stands accused. Followed or not followed by punishment, —the persuasion entertained respecting the truth of the accusation, entertained by

every man to whose cognizance the particulars of the examination present themselves, will be the same. The part that will be in general acted on such occasion by a man who feels himself guilty, being made known to all mankind by reason grounded on experience; so sure as that part is acted by any man, so sure will he be looked upon as guilty by all who know of it: and, being so looked upon, the disrepute attendant upon the offence, the punishment attached to it by the popular or say the moral sanction, the forfeiture of a correspondent portion of esteem, and consequent good-will, attaches upon him of course.

Supposing him not guilty, every fact and circumstance that he knows, will contribute (if known) to manifest his innocence: for, that he has not done the act charged upon him, is certain, by the supposition. Between facts that are all true, there cannot be any incompatibility, any inconsistency: if, therefore, there be a single true fact with which the fact charged upon him is inconsistent, that fact cannot but be false. Speaking, therefore, from memory, and not from invention, — by every fact he discloses he gives himself an additional chance of manifesting the falsity of the imputation cast upon him. Forbearing to put in for this advantage, he makes manifest by as plain a token as it is possible for a man to display — as plain as he could by any the most direct confession that were to confine itself to general terms, — that the situation he is in, is of that sort that does not suffer a man to put in for that advantage: the situation of him whose memory holds up to him the picture of his own guilt.

Such are the grounds of the inference, spread

out at full length. But where is the individual, male or female, high or low, rich or poor, who, being of ripe years and of a sound mind, is not in the habit of drawing the same inference with equal correctness and security, though by a shorter process, and without the trouble of clothing it in words? Where is the master or mistress of a family, who, seeing reason to suspect a child or servant of any forbidden act, does not, for the confirmation or removal of such suspicion, employ this species of evidence, and with more confidence than any other?—*Silence is tantamount to confession*, is accordingly an observation, which, whether it may happen or not to have been yet received in any collection of proverbs, is repeated and acted upon with not less confidence and certainty, with not less safety, than the most familiar of the sayings which have been thus distinguished.

Could the existence of a set of human beings have been conceived, endowed with any particle of the attribute of rationality, in whom a conceit of any kind should to such a degree have extinguished the lights of reason and common sense, as to have disposed them to shut the door of justice against this surest, safest, and most satisfactory species of evidence? Yes: two have already been indicated:—English lawyers,—and a people whose boast it is, with eyes hermetically closed, to be led by a hook put into their noses by the interested hands of English lawyers.

In the character, or at any rate the guise, of an objection or exception, one consideration has here a claim to notice. A case (it may be said) there is, in which, in the instance of a defendant under examination, the inference

from muteness to delinquency will not be just;—understand, the individual act of delinquency of which he stands suspected: for it is relatively to that, and that alone, that decision pronouncing delinquency can be pertinent and just. His conduct will be just the same, if, instead of the motives furnished (as above) by appropriate delinquency, there be any others to which it can happen to bind him to silence with equal force. And, without having been guilty in respect of the individual act of delinquency imputed to him, may it not happen to a man to be bound to silence by the pressure of other equally coercive, or even more than equally coercive, motives?

Yes, certainly it may: but of what nature can be these hypothetical and just possible motives? Motives derived from delinquency; motives not derived from delinquency. Under one or other of these divisions they cannot but be comprised.

Say, in the first place, motives derived from delinquency. The delinquency from which they are derived will then be of an order inferior, equal, or superior, (understand, as indicated and measured by the degree of punishment,) with reference to the act of delinquency upon the carpet. To motives derived from delinquency of an inferior order, it cannot happen to have produced this supposed equal pressure: sooner than expose himself to the superior punishment, as he would by silence, a man will make answer, though such answer be confession, and though the effect of such confession be to expose him to punishment,—such punishment being, by the supposition, inferior to

that to which he would expose himself by silence.

Put the case of equal delinquency and punishment, the silence will be quite natural: put the case of superior delinquency and punishment, it will be still more so. But what follows to the prejudice of the conclusion, at least in respect of the utility of the practical conduct proposed to be grounded on it?—absolutely nothing.

1. In the first place, a coincidence of this sort, though possible, is much too rare and too improbable to constitute a valid objection to the practical conduct to which the inference leads. If valid as an objection to conviction and execution in this case, it would be an objection at least equally valid to conviction and execution in every case: it would be an objection more than equally valid to every other species of circumstantial evidence; in a word, to every other species of evidence. False testimony,—even false criminative testimony,—at least, false testimony amounting to mere incorrectness, and not accompanied with criminal consciousness,—is more common than the sort of coincidence here supposed. False testimony in cases non-penal is abundantly more so: in penal causes, false testimony on the exculpativ side still more so. Cases of this rare sort have now and then appeared; but as often as they have appeared, they have been cited, not for their probability, but for their extraordinariness.

A story I have often heard or read of (no matter which) may serve for illustration. An entertainment was given by some great per-

sonage to a numerous and mixed company: in the course of it a trinket was displayed, the value of which had, by I know not what operation of the principle of association, been raised in his imagination and affections above all ordinary estimation. On a sudden, an alarm was given that the precious article was missing. "Let every man of us be searched," said one of the company. "Yes; let every man of us be searched," said all the rest. One man alone refused: the eyes of all were instantly upon him: his dress betrayed symptoms of penury: no doubt remained about the thief. He entreated and obtained of the master of the house a moment's audience in a private room. His pockets were turned inside out, when in one of them was found—not the lost trinket, but something eatable. He had a wife who for such or such a time had gone without food.

The story may be true or not true: but supposing it ever so true, would it afford any valid objection against the universally-prevailing law which authorises the making search about the persons, abodes, and other receptacles, in the occupation of suspected persons, for stolen goods? It would afford a better argument in such case against such search, than the possibility of the coincidence in question can afford against the examination of a defendant.

2. Another consideration is, that,—supposing the coincidence realised, the inference drawn (and that by the supposition an erroneous one), and the decision followed by the practical measures which are the proper consequences,—still there is no harm done.* A

* I say, for shortness, there is no harm done; for correct-

man suffers for an offence indeed of which he is not suspected or accused, but not for an offence of which he is not guilty. The consequence is good in all its shapes:—prevention by example—prevention by incapacitation—reformation—compensation, if the case calls for it, and furnishes matter for it:—the good, in all its shapes, that is looked for in penal justice; none of the alarm that reverberates from injustice.

Remains the case of the absence of all delinquency. But if the former case is so rare, how much rarer is this latter case! To a suffering, equal or superior to that which is fastened upon a man by the given delinquency with the punishment annexed to it, he would expose himself, were he to make his conduct known:—expose himself, without being justly chargeable with any act of delinquency,—without having done any of those acts in virtue of which the punishment would be just. This, indeed, is possible, but still more improbable.

Innocent himself, a man chooses to be treated as if he were guilty, rather than to expose the secrets of a mistress or a friend. An act of martyrdom perfectly heroical, and the more heroical, the fitter a subject for a play or a romance. But the more heroical the more rare; and therefore the less fit a subject to constitute a ground for the steps of the legislator.

ness, the expression will not serve. A harm there is done: the harm which consists of insufficient punishment,—the harm which takes place when a man, having incurred a greater punishment, is, instead of it, subjected to a less.

The secret protected at this price, the secret of the mistress or the friend,—was there any spice of delinquency mixed with it? The muteness, heroical or otherwise, is at any rate criminal: it is the common case of an unwilling witness, unwilling to expose a friend to the punishment which his delinquency has incurred: that sort of contumacy which, wheresoever it exists, it is incumbent on the law to get the better of at any price.

Without any the least guilt on any part,—on the part of the examinant himself, on the part of his mistress or his friend;—of a true and full account of his own proceeding, out of his own mouth, will the effect be to subject them or him to punishment? Of a conduct which, not being tainted with delinquency, exposes a man to suffer as for delinquency, are any examples to be found? Not impossibility: but, once more, the case is too extraordinary to afford any tolerable ground for the rejection of so instructive a species of evidence; a species by far less exceptionable, less liable to give birth to undue decision, than any other that can be named.

Appearances are against him (to borrow a phrase from the title to a play): appearances are against him; and, by the disclosure of these appearances, he subjects himself to punishment for an offence of which he was innocent. Appearances are against him? Yes, some of the appearances: but are there none that are for him? The same examination which calls upon him to disclose the one, calls upon him to disclose the other: of those which are against him he is called upon to give an explanation: the explanation, if favourable to himself, will,

by the supposition, be conformable to truth : being conformable to truth, is the conclusion to be that it will be disbelieved? That by possibility it may be so, is not to be denied ; but, once more, probabilities, and not improbabilities, constitute the true ground for legislative practice.

II. *Non-responsion extra-judicial* : in a penal case, the act (the negative act) of him who, understanding himself to be suspected of an offence, and being interrogated concerning it, forbears to make answer to such judicial questions as are put to him in relation to it.

The tendency of this case is evidently to afford an inference of the same nature as is afforded in the case just mentioned. In degree, however, the inference will most commonly be weaker, and is capable of existing in all degrees down to 0. The strength of it depends principally upon two circumstances : the strength of the appearances, (understand, the strength they may naturally be supposed to possess, in the point of view in which they present themselves to the party interrogated),—the strength of the appearances, and the quality of the interrogator. Suppose him a person of ripe years, armed by the law with the authority of justice, authorised (as in offences of a certain magnitude persons in general commonly are, under every system of law,) to take immediate measures for rendering the supposed delinquent forthcoming for the purposes of justice,*—authorised to take such measures, and to appear-

* To conduct the party, for example, to a magistrate, or, at any rate, to give information to a magistrate, for the purpose of the party's being so conducted before him.

ance having it in contemplation so to do; — in such case, silence instead of answer to a question put to the party by such a person, may afford an inference little (if at all) weaker than that which would be afforded by the like deportment in case of judicial interrogation before a magistrate. Suppose (on the other hand) a question put in relation to the subject, at a time distant from that in which the cause of suspicion has first manifested itself,—put at a time when no fresh incident leads to it,—put, therefore, without reflection, or in sport, by a child, from whom no such interposition can be apprehended, and to whose opinion no attention can be looked upon as due: in a case like this, the strength of the inference may vanish altogether.

In the three remaining cases, (that of the plaintiff in a penal cause, that of the plaintiff and that of the defendant in a non-penal cause)—from what has been said it will be easy to deduce the nature and strength of the inference afforded by this same modification of circumstantial evidence. In all these cases, the evidentiary fact being non-responcion, the fact evidenced will be want of right,—unfoundedness of the pretensions advanced by them in their respective situations. In all these cases, the relation—the connexion—between fact and fact, on which the presumption grounds itself, is the same: the cases in which the presumption is liable to fail, are also much the same: but the injury liable to result to the individual from a decision to his prejudice, in the case where such decision, in respect of its being grounded on such presump-

tion, is undue, being by possibility not so great, — the inference will be drawn with so much the greater freedom in any of these three latter cases than in the case first-mentioned.

III. *False responsion.* The inference is of the same nature; and in point of strength, whenever in this respect there is any difference between this case and that of non-responsion, it is in this case that the inference (the probability of guilt) will be the strongest.

In the case of judicial interrogation, the particular inference applying to the particular case will be strengthened by the general unfavourable inference, the shade thrown upon a man's character by the additional circumstance of falsehood: supposing it always to have acquired the tinge of mendacity by the infusion of criminal consciousness.

In the case of non-judicial interrogation, whatever counter-inference may be deduced from the topic of incompetency on the part of the interrogator, will, by the additament here in question, generally speaking, be repelled.—A question, an idle question, put to me by a child? a question from such a quarter? could I have conceived that it would be thought to have any claim to notice?—In justification of simple silence, the defence might be pertinent, and even convincing: to false responsion, the application of it could scarce extend. Of the claim it had to notice, you yourself have borne sufficient testimony: so far from grudging the trouble of a true answer, you bestowed upon it the greater trouble of a lie.

False answers are, naturally enough, inter-

spersed more or less with self-contradictory ones. The case is no otherwise varied by the intermixture than by this, viz. that in the case of self-contradiction the falsehood is more palpable and incontestable. Of any two contradictory propositions, the one or the other will of necessity be false. Take away this internal and irrefragable proof, the detection of the falsehood must rest upon the basis, the more or less precarious basis, of other evidence.

IV. *Evasive responsion*, is responsion in words and appearances, non-responsion in effect: it may be termed *virtual non-responsion*. Under this head may be comprised all answers, in so far as they are irrelevant to the interrogatories: all answers in which nothing is contained that has, in any respect, the effect of a compliance with the requisition (or say command) which every interrogatory, as such, involves in its very nature.*

Responsion is either relevant or irrelevant. If irrelevant, and after admonition persisted in, it is evasive: if evasive, it is tantamount to silence; or rather, in the case of evasion (if there be any difference) the inference is stronger. Silence may be ascribed to stupidity: evasion is the work of art, — the natural resource of self-condemning consciousness.

But evasion, — to what circumstance, when successful, does it owe its capacity of having the effect of silence; that is, the desired effect

* *Where were you at such a time?* is as much as to say — *My will is, that you name to me the place at which you were at such a time.*

without the undesired? To *indistinctness*: every thing is referable to this cause.

In some instances it will now and then happen that indistinctness, designed or undesigned, shall have the effect of false statement, affirmative or negative. In that case, upon a first view, and for the advantage of his design, he is taken to have said something,—while, upon a second view, and to the disadvantage of his design, he is not found to have said any thing:—as against punishment or other burdensome infliction, he is secure; when, perhaps, by means of some false and fallacious conceptions conveyed by these same words to the mind of the judge, he has produced the same desired effect that would not have been produced if any assertion had been hazarded by him in express words.

But the most common deceptitious effect and use of indistinct language (understand to the deceitful deponent), is to operate as a succedaneum to silence: to prevent the judge, or whoever on this occasion stands in the situation of the judge, from observing, among the several points to which a man could not have spoken truly without speaking in the way of confession, what there may be to which he has forbore to speak.

Evasion is a sort of middle course between non-responsion, false exculpativè responsion, and confessorial responsion. Compelled to say something, on pain of the consequence which cannot fail to attach upon his virtual refusal to say any thing, a man keeps saying what amounts to nothing; partly in the hope that the imposition may pass undetected, and

the insignificant discourse be accepted as if it were significant; partly to give himself time to consider into which of the two other paths—confessorial truth or exculpatory falsehood—he shall betake himself.

The effect of indistinct language, in the character of an advantageous substitute to false statement or silence, depends greatly upon the magnitude of the mass—the *voluminousness* of it, in the case of written language. Take a single short proposition,—be the language of it ever so indistinct, it will commonly be seen to be so: the insignificance of it, and (in case of *mala fides*) the evasiveness, will be seen through. But, in psychological as in physical objects, as the mass increases, the transparency diminishes: and since, along with the indistinctness of the object, the exertion of the mind in its endeavour to see through it increases, it will not unfrequently happen that the sinister purpose of the manufacturer of the chaos shall be effected, by the mere lassitude of the eye which has the misfortune to stand engaged to look into it.

Order—method—is among the instruments which intellectual vigour has to construct for the assistance of intellectual weakness, and which, when made, intellectual weakness assists itself by, in its endeavours to surmount the difficulties it has to contend with. But as, on one hand, the labour and difficulty of producing order, so, on the other hand, the demand for it, increases with the magnitude of the mass; with the multitude of the elementary particles which compose it. Order—meaning good order—order the best adapted to the purpose—consists in

the selecting, out of the whole number of changes capable of being rung upon the number of elementary parts in question, that one of the whole number that will place the aggregate mass in the most intelligible point of view. The number of changes capable of being rung upon an assemblage of elementary parts, increases with the number of those parts:—increases with that rapidity of increase which is so familiarly and precisely known to mathematicians, and which is matter of so much astonishment to persons altogether unconversant with the first rudiments of that science. But, with the number of changes capable of being rung upon the elementary parts of the mass in question, increases the chance in favour of disorder and confusion,—the difficulty of producing order,—the difficulty of detecting the want of it,—the difficulty of pointing out the remedy for the want of it, for the purpose of insisting on the application of the remedy,—the facility of producing that sort and degree of disorder which shall weary out the energies of the inspecting eye, and force it to withdraw from the subject altogether, to save itself from the labour (perhaps the fruitless labour) of persevering in the endeavour to discover what has and what has not been said and done.

It is in written language alone that the art of evasion finds a favourable field for its operations. Let the deposition be delivered *viva voce*, any attempt of this sort is soon rendered abortive. Though accepted in such abundant instances in the ready written form, in masses of any magnitude; testimony is never accepted

in the spontaneous mode, in the form of *vivâ voce* testimony, in a mass of any considerable magnitude. Delivered in the *vivâ voce* form, and thence in the presence of the judge; if indistinct, and by law not capable of being subjected to interrogation (for to this pitch of opposition to common sense has legal usage soared),—no better purpose—none more favourable to the design of the *malâ fide* deponent—will be answered by it than would have been answered by silence. But, if subject to interrogation, by interrogation it would immediately be clarified, and reduced either to false statement or to verbal silence. Delivered in the shape of written language, a mass of indistinct matter runs on to any number of pages or volumes: delivered *vivâ voce*, in the presence of a person having power to interpose at any time by interrogation, it is stopped at the first indistinct word.

CHAPTER VI.

OF SPONTANEOUS* SELF-INCULPATIVE TESTIMONY, CONSIDERED AS AFFORDING EVIDENCE OF DELINQUENCY.

SECT. I.—*Confession, and Confessorial Evidence, what — Distinction between them.*

WHEN the supposed delinquent is really guilty,—the offence the subject of discourse between himself and another person,—and he himself the speaker;—in the natural course of things the composition, of the discourse will be a mixture of falsehood and truth: fear of detection, and the view of the criminative force with which (in so far as followed by detection) falsehood never fails to act, being sufficient to prevent it from being willingly recurred to in any other case than where, to repel suspicion, it seems altogether indispensable. But, though in the discourse itself these elements will generally be found in a state of combination,

* By *spontaneous* self-inculpative testimony is here meant, as will hereafter be seen, not self-inculpative testimony which is voluntary, and intended to be self-inculpative, in contradistinction to that which is not so intended; but merely that which is *not*, as distinguished from that which is, extracted by interrogation. *Spontaneous* is here, as in the book on EXTRACTION, employed as synonymous with *uninterrogated*.

yet, for the purpose of explanation, it will be neither useless nor impracticable, to separate them in idea, and examine them apart.

Moreover, on the occasion of any such discourse,—howsoever it should have happened that the discourse was begun by the supposed delinquent, whose conduct, by the supposition, is the subject of it,—yet it will seldom happen but that, in the view taken of it by the hearer or hearers (say, for simplicity's sake, the hearer), it will in this or that part appear obscure, ambiguous, or (if not incorrect) at any rate more or less imperfect; in every one of which cases,—if, on the part of the hearer, discourse as well as thought is free,—interrogation on that part, responsion on the other, will, in some shape or other, take place of course.

In the ordinary colloquial intercourse between man and man, it is, however, not less natural for the discourse to take its commencement without interrogation than by interrogation: having been thus begun, it may happen to it to continue upon that same footing for any length of time: and, so long as upon that same footing it does continue, it will be conducive to distinctness of conception to consider in what shape the sort of evidence in question—self-disserving and self-criminative verbal evidence—is capable of presenting itself by itself, and without any admixture of that sort of evidence in the extraction of which interrogation has been the instrument employed.

When, on the part of a supposed delinquent, discourse of the self-regarding kind, and (with relation to the offence in question) of a self-

disserving, and thence (it being a case of supposed delinquency) of a self-criminative or self-inculpativè tendency, is considered as sufficient of itself to justify a judgment of conviction, declaring him convicted of that offence; such discourse is, when taken in the aggregate, styled in judicial practice a *confession*.

In regard to the two modifications of evidence distinguished from each other by the denominations of *direct* and *circumstantial*, it has already been remarked how intimate the connexion is,—how faint and oftentimes scarce determinative the boundary line which separates them.

In a *confession*, if so it really be that it is particular enough to form a sufficient ground for conviction, it cannot fail to contain more or less of that sort of evidence which, requiring no ulterior inference to be drawn from it, may with propriety be considered as being of the nature of *direct* evidence. But, moreover, what can scarcely happen is, that it should not contain any admixture of circumstantial evidence; viz. of propositions, each of which (coming as they do from the supposed delinquent), supposing it to have stood by itself, might have operated with more or less probative force towards conviction, by means of some inference for which it would afford a ground,—by means of some such inference, and not otherwise.

When it amounts to a *confession*, the mass of discourse in question is full and satisfactory, as above. But even when, so far as it goes, the tendency of it is disserving, and, in respect of the occasion, self-criminative; yet, when delivered in loose and casual fragments, it

may happen to it to possess this tendency in any the slightest degree imaginable; operating with any degree of probative force, from the highest to the lowest.

In the case where the whole mass, being complete, would have amounted to a confession; if any fragment is broken off, the remaining force may be styled a mass or article of confessorial evidence.*

* The word *confession* is apt to suggest the idea of a voluntary acknowledgment made by the defendant of his having committed the offence with which he is charged. The confession, however, may be either voluntary or involuntary; and it may have for its subject, not the offence itself, but some fact or facts evidentiary of it.

The fact which is the subject matter of the confessorial evidence may be either a fact of the number of the principal facts by which, taken together, the complex fact of the defendant's criminality is composed; or it may belong to any one of those classes of evidentiary facts which have been or will hereafter be brought to view in the character of so many species or modifications of circumstantial evidence. Preparations, attempts, declarations of intention, threats: physical and involuntary symptoms of fear, betrayed by the confessionalist upon an occasion specified: the care taken by him to conceal the obnoxious event, the criminal act,—or his person while engaged in it; to keep out of the way all persons whose presence might have been dangerous in the character of percipient witnesses of it: the language held by him, before the act and after it, in the view of quieting suspicion, or preventing it from coming into existence: the exertions employed by him upon a variety of objects, of the class of *things*, in the view of preventing them from assuming appearances capable of testifying against him in the character of real evidence: the exertions employed by him in the view of giving to any of those objects delusive appearances, tending to bring to view the obnoxious event as being the work of mere accident, or of some other agent: the labour employed by him upon the apprehended witnesses, whose observations, in the character of percipient witnesses, he could not prevent from coming into existence: the exertions made by him to keep them out of the way by direct

This, it will be seen presently, is far from being the only species of imperfect self-dis-

threats or promises, by deceitful representations, or by downright force,—or, in the event of their appearance, to suppress the facts indicative of his guilt, or even substitute to them pretended facts indicative of his innocence: the exertions made by him for the purpose of operating in the like manner upon persons who had begun, or were expected by him, to act against him, in the character of prosecutors: the exertions made by him for withdrawing his person and property out of the reach of justice, and in the mean time for concealing himself: the motives by which he was stimulated to the commission of the offence: the length of time during which these motives had been operating on his mind, and the turn which this disposition of mind had, on different occasions, given to his conduct: the language which it had occurred to him to hold to different persons on different occasions, whose questions or observations he had to encounter in relation to the principal facts of the offence, or any other facts whose connexion with it might, to his apprehension, be discovered or suspected: the silence he ventured or was forced to maintain on some occasions; the false or evasive answers it occurred to him to give on other occasions; with the self-contradictions which, on some of those occasions, he fell into in consequence: the memoranda he had made of some of the facts connected, in one way or other, with the criminal enterprise; the letters he had written to or received from associates; and his alarm under the apprehension that some of these documents had fallen into the adversary's hands: his fears under the apprehension that among his consultations with his confederates there were some that might have been overheard by persons, through the evidence of whose discourse they would not fail to be conveyed to the notice of the adversary: his fears that among his associates there were some who either already had been, or soon would be, unfaithful to their trust.

Not only so, but a fact that in itself has no perceptible connexion with any criminative fact, may, by accident, operate to the prejudice of the defendant; and in that respect the discourse, by which the existence of that fact has been stated by him, may operate against him in the character of confessorial evidence.

An extraneous witness, speaking to a supposed confes-

serving, and thereby self-criminative or self-inculpative, evidence, exemplified in practice. It is, however, one species of self-disserving evidence : and forasmuch as a mass of simply confessorial evidence (*i. e.* a mass of confesso-

sorial discourse supposed to have been held in his presence by the confessionalist, mentions a variety of facts as having on that occasion been stated by the confessionalist,—facts, of the existence of which, but for such confessorial discourse, such reporting witness could not have been apprised. A number of facts—(suppose) transactions of the confessionalist himself, connected or not connected with the criminal enterprise,—are thus reported as having, on the occasion in question, been reported to the witness by the confessionalist; the existence of these several facts is put out of doubt by other witnesses coming forward, and deposing, in the character of percipient witnesses, as to such facts as, in the character of evidentiary facts, point directly at the defendant's criminality :—the report made of them by the confessionalist to the reporting witness assumes directly and obviously the character of confessorial evidence. But even those which have no such operation serve to confirm the veracity of the statement by which the reporting witness reports the tenor or the purport of the already described portion of the defendant's confessorial evidence. Moreover, in the same proportion in which it tends to demonstrate the trustworthiness of the evidence of the reporting witness,—of the whole body of it taken together,—in that same proportion it evidently operates in prejudice of the defendant's cause. It therefore comes, as incontestably as the other branch, though not so obviously, under the character of confessorial evidence.

In the trial of John the painter, the incendiary who in 1777 burnt the rope-house at Portsmouth, the conviction was grounded principally on the defendant's confessorial evidence, as reported by an extraneous witness, Baldwin; and, of the evidence given by other witnesses, a great part consisted in confirmatory statements of other facts, in themselves immaterial, but stated by the defendant in the confessorial narrative given by him to that reporting witness. Yet on this occasion the advocate for the prosecution boasted much, and not without reason, of the probative force, of the conclusiveness, of his evidence.

rial evidence not amounting to a confession) does not of itself form a sufficient ground for conviction, while a mass of confessorial evidence amounting to a confession does of itself form a sufficient ground for conviction; it would be of no small utility in practice, if a criterion was established, whereby, without danger of dispute or misconception, it might upon every occasion be pronounced of a mass of self-disserving and self-inculpativ evidence, whether it was a complete confession, or nothing more than a mass more or less considerable of confessorial evidence.

Let this criterion be constituted by the application of the process of *interrogation*: interrogation, oral or epistolary (as shall be determined), but at any rate judicially performed: insomuch that, — be the mass of confessorial evidence, upon the face of it, ever so correct as well as complete, — yet, until and unless, for the assurance of its correctness as well as completeness, it has had that security which it is not in the power of any thing but the process of interrogation to afford, let it not be considered as amounting in any case to a confession, for any such practical purpose as that of conviction, as above mentioned.

Short of a confession, — although (so far as it goes) confessorial, — it may of course be, after and notwithstanding interrogation; but without interrogation let it never be considered as amounting to a confession, in what degree soever, upon the face of it, ample and instructive.

Another condition which it might, perhaps, be proper to add to the description of a confes-

sion, is this : viz. that, to amount to a confession, although extracted by judicial interrogation, it ought to be such as would have been sufficient to warrant a conviction had it been delivered by an extraneous witness.

Self-regarding evidence, as has been observed in a former chapter, is the only species of direct testimonial evidence which, with reference to a complex act of the description in question (a criminal act), can be complete, without comprehending any article whatever of circumstantial evidence, — without leaving any fact to be made out by inference. When it is thus complete, — mention being made in it of every fact (psychological as well as physical) which is necessary to complete the description of the offence ; (this deponent, the person whose testimony it is, being the defendant, the person who stands accused or suspected of that offence) ; such body of evidence may be termed *plenary confession*. If there be any one such fact of which express mention is not contained in the mass of evidence so denominated, the confession, whether satisfactory or not, is, at any rate, short of *plenary*. In practice it may very well happen that in this or that instance it may, without being strictly speaking plenary, be considered as being equivalent to plenary, and as satisfactory as if it were so. As, for instance, if Reus, being accused of the murder of Occisus, on being interrogated, says, “ Yes : it was indeed I who struck the fatal blow.” In this example nothing more is necessarily deposed to than the physical act : but, from the confession thus made of the physical act, the existence

of the correspondent intention (a psychological fact) will naturally enough be inferred of course.*

There is no imaginable lot of testimonial evidence which may not (as hath already been observed) operate in the character of direct as well as in that of circumstantial evidence. As this is the case with extraneous, so is it, and more particularly, with self-regarding evidence. Direct with reference to one fact (the fact asserted by it), it may be circumstantial with regard to another fact, a fact inferred from the assertion. But its being capable of operating in the character of direct evidence does not lessen the force of the demand which calls upon us to consider it in the character of circumstantial evidence. There is, therefore, no possible modification of confessorial evidence, that will not require to be considered here under the head of circumstantial evidence. In truth, it is only in its character of confessorial evidence, — in respect of its capacity of affording inferences, meant or not meant by the party to be drawn from it, — that it admits so great a variety of modifications. Consider it purely and simply in the character of direct evidence, — consider the assertion as evidentiary of the fact

* Confessorial evidence, when not plenary *per se* — in itself — may yet be so by *relation*. It is so by relation, when it refers to some other discourse in which whatever is wanting to make it plenary is contained.

Thus, when, in the form of English law, at the opening of the trial, the question is put to the defendant, How say you, guilty, or not guilty? — if the answer be, *Guilty*, the confession is plenary by relation; for it refers to the full description of the offence, as contained in the instrument of accusation called the *indictment*.

asserted by it, and nothing more,—all these distinctions vanish. By the assertion in question, the fact asserted is proved, or not proved,—that fact, and that fact alone,—according as the testimony is regarded as true or false.

In considering whether a given lot of self-regarding evidence belongs or not to the head of confessorial evidence, regard must be had, not to the conception entertained or not by the confessionalist himself, in regard to the consequences of it (whether to himself or others), but merely to the use eventually made of it when exhibited in the course of the cause. The application of which it is regarded as susceptible being considered, the idea of reluctance on the part of the confessionalist will naturally enough be presented by the term *confession*, and its several conjugates. But if reluctance were looked upon as a necessary component circumstance, the extent of the idea thus annexed to the term would be found to fall far short of the extent that will be found necessary to be given to it on many of the occasions on which the demand for it presents itself. These occasions will be distinctly brought to view, when we come to speak of the different modifications of confessorial evidence. The case where the utterance of it is attended with reluctance, is but one out of many distinguishable modifications.

SECT. II.—*Of Spontaneous Confessorial Evidence extra-judicially delivered.*

OF this species of evidence it being one characteristic property that the tendency of it is

prejudicial, and that in any degree up to the highest, to him to whom it owes its birth ; and another, that it comes out spontaneously, and without any application of the instrument, with the help of which, evidence of the same tendency is capable of being extracted from the unwilling mind by the hand of power ; two doubts naturally present themselves as seeking for satisfaction : viz. to what causes it is capable of owing its birth ? and to what others its introduction to the theatre of justice ?

To the first of these questions an answer may be conveyed by so many specific denominations, each of them having the effect of indicating the cause (the psychological cause) to which the species so denominated owes its birth. To the other, an answer will be afforded by an indication given in each instance of the *causes of transpiration* ; incidents, by the force of which it has been found in practice that evidence of the species in question has made its way to the theatre of justice.

1. First species of self-inculpativè or self-criminative evidence, *conspiratorial* evidence. Discourse held amongst delinquents as to the time, place, means, and other circumstances, of the offence ; whether already committed, or as yet but meditated.

Examples of the causes of transpiration :—
1. over-hearing ; 2. loss of papers by accident, by interception, by seizure ; 3. disclosure, with or without treachery, on the part of one or more of the co-delinquents.

2. Simply *confidential*. A disclosure made (whether from any interested view, or merely in expectation of sympathy) by one or more of the co-delinquents, before or after the commission

of the offence, to an individual who either was or was expected to be a partaker in it.

Transpiration causes the same in this second case as in the first.

3. *Jactitantial*,—directly or *purposely jactitantial*. The supposed offender, taking a pride in the offence, or in the reputation of having committed it, makes an intentional and unreserved statement of it, in a manner more or less circumstantiated, to one on whose part he expects on that account esteem or sympathy.*

Transpiration causes still the same.

4. *Jactitantial through unadvisedness*. In the view of conciliating esteem or sympathy, a man relates some act of his, in itself not criminal or otherwise obnoxious, but which (in one way or other) becomes evidentiary of the principal act, the act of delinquency in question.

Transpiration causes still the same.

5. *Simply unadvised, or unadvisedly colloquial*. In the way of ordinary conversation, without any design of boasting, a man speaks either of some act of his own, or of any other incident, any other matter of fact, which,—in virtue of some connexion, that he is not aware of, with the principal fact in question, the fact of his delinquency,—operates in the character of an evidentiary fact in relation to it: for example, his having been in such a place at such a time.

* In the case of John the painter, who (anno 1777) was hanged for setting fire to a public store-house at Portsmouth, under the notion of rendering service to the American states on the occasion of the war which terminated in their independence, the principal part of the evidence was of this complexion.

So in the case of Crossfield, who was tried on a charge of being concerned in a plot for the assassination of his late majesty by means of an air-gun.

Transpiration causes still the same, except that there is no place for treachery, no confidence having been placed.

6. *Unadvisedly exculpativæ*. Finding or apprehending himself exposed to the imputation of the act of delinquency in question; the supposed delinquent, in the view of wiping off the imputation, or screening himself from it, mentions in discourse some matter of fact, which, without his being aware of such its tendency, contributes to the contrary effect, as above.

Transpiration causes as per last; no room for treachery.

7. *Penitential*, or penitentially confessorial. Though by the supposition the occasion on which it is delivered is here extra-judicial, it may happen to it to have been delivered in contemplation of its being judicially produced in evidence. If so; here, as in the case of a confession or confessorial evidence judicially delivered, transpiration is out of the question. If so it were that the communication was made in confidence, it then, in respect of transpiration causes, coincides with simply confidential self-disserving evidence, as above. But, in this case, as in that other, it remains for inquiry, by what causes a course so repugnant to the universally-prevalent principle of self-preservation was produced.

8. *Superior-benefit-seeking*. By the pursuit of some benefit, it may happen to a man to make known some fact, which,—without his being aware of it, or even though he be aware,—may happen to contribute, in the character of an evidentiary fact, towards his being convicted of the offence in question. Probability and nearness, as well as magnitude, considered

on both sides, it may happen that the value of the benefit shall be in his eyes so great, as to more than compensate for the risk of the whole mass of evil, punishment included, which he beholds attached to the offence.

The infirmative considerations applicable to the probative force of criminative circumstantial evidence of this class, seem capable of being designated in general terms by three words : viz. 1. misinterpretation ; 2. incompleteness ; 3. mendacity.

1. Misinterpretation has in this case the effect that incorrectness on the part of the evidence itself has, if not misinterpreted : inasmuch as, though the evidence itself be not incorrect, yet the conception produced by it (either in the mind of the judge, or in the mind of the extra-judicially percipient witness, the ear-witness of the discourse, and through him in the mind of the judge), is incorrect and deceptitious ; causing the supposed delinquent to be believed to have committed an act of delinquency which in truth he did not commit.

2. As to incompleteness ; it depends upon the manner in which it is incomplete, whether the effect of it shall, to the prejudice of the supposed delinquent, be the same as that of incorrectness, or whether it shall amount to nothing more than the rendering the probative, the criminative, force of it, less considerable than if it had been nearer to the being complete.

3. By mendacity (here as elsewhere) is to be understood wilful and purposed incorrectness ; where the evidence thus delivered, the discourse thus used, is incorrect, being rendered so wilfully, and on purpose.

1. *Misinterpretation.* By misinterpretation on the part of the judge, the deceptitious effect produced by circumstantial evidence of this description is susceptible of modifications, analogous to that already mentioned as producible by misinterpretation of preparations and attempts, directed in appearance, but (as in the case supposed it happened) not in reality, to the act of delinquency eventually committed. Instead of the act which, by means of the misinterpretation, is supposed and concluded to have been committed; under the supposition of its having been virtually acknowledged to have been committed; the act really performed may have been, 1. blameless, though seeking secrecy; 2. blameless, and not so much as seeking secrecy; 3. imaginary: as, if the intimation given of it, whether directly or in the way of allusion or insinuation, was meant in the way only of sport or jest; or, if the act committed by the supposed delinquent, and meant by him on the occasion in question to be spoken of, was an act which, though culpable, was culpable in a different manner, or in a less degree, than the act which, from the consideration of such his discourse, is inferred from it, and believed to have been committed.

Many cases may be put, in which that which really is not a confession might be taken for and acted upon as such.

A paper is found, in the defendant's handwriting, charging him, the defendant, with a crime. Though written by the defendant's hand, it may have been the discourse of another person, and all of it false: simple curiosity, or

even the intention of refuting it, in a private way, or with the assistance of justice, might have been his motive for copying it.

The poet Jean Baptiste Rousseau wrote a virulent libel, aspersing a multitude of respectable characters, Saurin's amongst the rest, and circulated it in manuscript. Saurin, having borrowed one of these manuscripts, copied it with his own hand, for the purpose of answering it, or instituting a prosecution on the ground of it. Rousseau, hearing of this, or suspecting it, got possession of Saurin's copy, and on the ground of it, with the help of some false evidence for the explanation of it, instituted a prosecution against Saurin, charging him with being the author of it. The truth was discovered by the *viva voce* examination of the false witnesses: and this, too, without the benefit of that sort of examination which, under the name of cross-examination, they would have undergone had it been in England.

The confession may have been given in the way of jest: the whole of it, or any part, devoid of truth: neither, in fact, conformable to the truth of things, nor so much as meant to be taken for such.

A case of this description happened, if I have been rightly informed, not many years ago in England. From I know not what circumstances, a person, whom I will call Juraturus, was expected to be put upon the jury, in a cause of public expectation, in which the affections of political parties took an interest. A letter was written to him by Jocosus, conjuring him to see the defendant convicted, right or wrong. For this letter Jocosus was prosecuted, as for *embracing*:

(the name given by the English law to the act of extra-judicial *solicitation*, where the sort of ephemeral judge, called a juryman, is the subject of it). The matter being somehow explained, Jocosus escaped conviction, or at least punishment administered under that name; but the costs of prosecution were in effect a punishment, and a very severe one. Had the testimony of the defendant been receivable in law, and known to be so, the prosecution would hardly have been instituted.

2. *Incompleteness.* It is evident that an extra-judicial confession may be incomplete to any imaginable degree. For, 1. in the shape in which the discourse flows from the lips of the confessionalist, it may be loose and imperfect up to every conceivable degree of imperfection. 2. The interlocutor,—who may be sensible, or to the highest conceivable degree insensible, of such its deficiency,—may accordingly let it pass in such its imperfect state, without applying himself in any way to render it more complete. 3. Though he possessed, in ever so high a degree, the requisite inclination; the power, the effective power, of commanding and producing the requisite explanations, may on his part be deficient, in any conceivable degree.

3. The case of *mendacity* requires more explanation. To a first view, nothing can be more paradoxical than the case of a man's having recourse to falsehood for the purpose of subjecting himself, perhaps to the punishment, at least to the disrepute, attached to a supposed act of delinquency which in fact he has not committed. In the relation between the sexes may be found

the source of the most natural exemplifications of this as of so many other eccentric flights. The female unmarried, — punishment as for seduction hazarded, the imputation invited and submitted to, for the purpose of keeping off rivals, and reconciling parents to the alliance. The female married, — the like imputation, even though unmerited, invited, with a view to marriage, through divorce. Even without view either to marriage, or to possession without marriage; vanity, without the aid of any other motive, has been known (the force of the moral sanction being in these cases divided against itself) to afford an interest strong enough to engage a man to sink himself in the good opinion of one part of mankind, under the notion of raising himself in that of another.*

* A story current enough, but of which the source cannot be distinctly recollected, may serve as an exemplification of the field of enterprise in this line, which has been laid open by nature (too well seconded, as will be seen, by the blundering hand of English law) to unprincipled speculators. A man wishes to secure to himself, in the way of marriage, a hand, of which, by direct and honourable means, he has no sufficient hope. His object is, by destroying the reputation of his intended victim, to deprive her of all hopes that do not centre in himself. He takes the requisite measures: he bribes servants; he provides himself with the requisite equipment: in the costume of a happy lover, he shews himself to observers, casual or posted, through the window of her bedchamber, as Galatea shewed herself: — *Et fugit ad latebras, et se cupit ante videri.*

The outline thus delineated, the particular object, and the details of the plan, will (as already hinted) admit of considerable diversification. To the value of the prize obtainable at the price in question, there are evidently no determinate limits; and this, whether pecuniary profit (to the amount of which there is also no limit) be or be not taken into the account.

As to the price in the way of punishment, few if any are the existing systems of legislation that have, with any suf-

False confessions, from the same motive, are equally within the range of possibility, in regard to all acts regarded in opposite points of view by persons of different descriptions. I insulted such or such a man : I wrote such or such a party-pamphlet, regarded by the ruling party as a libel, by mine as a meritorious exertion in the cause of truth : I wrote such or such a religious tract, defending opinions regarded as heretical by the established church, regarded as orthodox by my sect.

In many cases, probably in most, the infirmative facts above brought to view will be seen to have no place : the import of the discourse, and its applicability to the purpose for which it is adduced, will be out of dispute. Though not complete, (for it is seldom that a lot of extra-judicial evidence will be endowed with that completeness with which it is the object

sufficient degree of consistency and uniformity, raised it to a pitch too high to find bidders. For seduction, under English law at least, (which, in every thing that concerns marriage, indicates for its author some old woman in her dotage,) for seduction, the maximum would be but a flea-bite : punishment as for capital violence, the charge being of the adventurer's own framing, he will know better than to accuse himself of.

To any bosom in which either love or money has infused the spirit of enterprise, the chancellor (who fancies himself, or pretends to fancy himself, the guardian of female orphans—who fancies, or pretends to fancy, his authority the bar to ill-assorted marriages, the protector against deception or imprudence) is but a laughing-stock. Ever ready to punish, he is ever impotent to prevent. Powerful to do mischief, he is impotent to do good : that good always excepted of which his professional brethren are the sharers, and which consists in distributing among them, in due form of practice, a portion of the orphan's substance.

of judicial examination to endow it,) it will, as far as it goes, be thus far complete, that it will be sufficiently manifest that no addition which it could have received could have been of a nature to destroy, or materially to change, the inference. The act, to the imputation of which the confessionalist was exposing himself by this his discourse, was really his act—really done by him; nor was he, on the occasion of holding such discourse, acting in prosecution of any such eccentric and perilous a design as that of subjecting himself to an imputation known by himself not to be merited.

A distinction requires here to be noted, between the case where the evidence may be said to be designedly furnished, and that in which it may be said to be undesignedly furnished, having been obtained, as it were, surreptitiously, by the party by whom it is produced or offered to be produced, without the consent of the party whose confession is contained in it.

In the former case, it partakes, in a great measure, of the nature of judicial confessorial evidence: the person to whom it is delivered, though not a magistrate, yet, by the relation he bears (casual and momentary as it is), may be considered as standing, in many respects, in the situation of a magistrate. The proprietor of stolen goods, having, by a train of indicative evidence, been led to the discovery of the thief, makes up to him, and charges him with the theft: the delinquent, through remorse, confusion of mind, or hope of favour, confesses the offence in all its circumstances, in a degree more or less particular. To extend the illustration, substitute for the case of theft the case

of any other offence, of that class which supposes the existence of an individual exposed to special injury; and to the case of the proprietor of the stolen goods substitute that of the individual so injured.

The reason and use of the distinction is, that when, as here, the confessorial evidence is furnished *ex proposito confitentis*, the same causes that are capable of giving birth to false confession, when judicially exhibited, are capable of producing the same effect in the case where it is furnished extra-judicially, as here:—confusion of mind,—hope of commuting a severer punishment for a less severe one,—hope of obtaining mercy,—despair of acquittal, produced by prospect of false evidence.

The opposite case, the case where the confession was obtained *imprudentiâ confitentis*, is the case which, on the former occasions referred to, was principally in view. The party, the confessionalist, has made a memorandum in relation to the fact, for his own use; this falls into the hands of the adverse party, who thereupon produces or offers it in evidence. In terms more or less particular, either direct or more or less indirect, the confessionalist has mentioned the fact in a letter to an accomplice or a friend: the letter falls into the hands of the adverse party, who produces it, or offers it, in evidence. The confessionalist has been overheard to mention the matter in conversation with an accomplice, a friend, or even (for no species or degree of imprudence is altogether without example) an utter stranger: through the medium of the extra-judicially audient witness, it comes round to the ad-

verse party, who (with or without his good will) engages him to come forward with the information, in the character of a judicially-deposing witness.

From the differences that exist in respect of the mode in which the evidence was obtained in the two cases, result several other differences. When of a nature approaching to judicial, the extra-judicial confession (having conviction, or, at least, full information, for its object, either on the part of him who delivers it, or on the part of him to whom it is delivered) will naturally be more or less effectually shaped and adapted to that purpose. When obtained, as above explained, in a manner by surprise, neither the confessionalist, nor (in the case of hearsay evidence) his interlocutor or auditor, has any such object; nor has the interlocutor or auditor, generally speaking, any means of shaping the evidence to that object. The shape in which it presents itself will naturally be that of some broken scrap, variable *ad infinitum* in respect of form, and quantity of information.

In the case where, as above, it is furnished by a man as it were with a halter about his neck, the language will necessarily be direct and explicit; and in that respect, whatsoever it may be in point of precision, (for precision will depend as much upon the party receiving the information as upon the party furnishing it,) nearly upon a par with that which it assumes when extracted by an official hand. In the case where it is furnished without apprehension of the use eventually made of it, it may indeed happen to the language of it to be

equally direct and explicit (as is apt to be the case with libels); but it is equally capable of existing in a form to any degree mysterious and indirect. It may consist of nothing but mere allusion; and, in any case, to find out a key to it, and apply it to the proof of the fact endeavoured to be proved from it, may be the task of argumentation and conjecture.

SECT. III. — *Of Spontaneous Confessorial Evidence, judicially delivered.*

FOR the advantage of viewing objects one at a time, the species of criminative evidence in question has hitherto been considered as being delivered as well without the intervention of interrogation, as without the intervention of the authority of a judge, present at the time. Of the intervention of these two circumstances, the consequences will be seen to be material.

If the self-criminative discourse be conceived to be held in the presence of the judge, it is not natural that (adequate power not being wanting) the use of so efficient a security for correctness as well as completeness should be foregone. But that which, in respect of its manifest mischievousness and absurdity, will be apt to appear most unnatural, is, under the influence of the sinister interest which gave birth to the technical system of procedure, but too frequently realised: for example, under English law, in the case of all those modifications of delinquency in relation to which the evidence is delivered in no other shape than that of *affidavit* evidence.

The scene of intercourse being now removed

from the closet to the theatre of justice; one consequence is, that, of the eight modifications of self-disserving evidence above brought to view, five stand excluded, as being incapable of finding entrance into a place so defended. These are, 1. *conspiratorial*; 2. *simply confidential*; 3. *purposely jactitantial*; 4. *unadvisedly jactitantial*; and 5. *simply and unadvisedly colloquial*. *Superior-benefit-seeking*, a modification under all circumstances rare and eccentric, is, by the authority of a present (though mute and inactive) judge, rendered still more unlikely to be hazarded; still more so by the presence of an interrogating judge.

Remain, as the only two modifications of self-disserving evidence natural to the spot now in question, — 1. *unadvisedly self-exculpative* evidence; and, 2. *penitential* or penitentially confessorial evidence.

To ground conviction, confession (it has been said) ought to be perfectly free, not produced either by hope or fear. Such is the language we frequently meet with in English law books. Reason is here obscured by a covering of absurdity. Accused or suspected of a crime, guilty or innocent, — what but hope or fear should induce a man to speak? Guilty, in particular, what but hope or fear should induce a man to confess? Confession without hope or fear, is an action without a motive, an effect without a cause. It is more; it is an action without an inciting motive, overcoming a force (and that a mighty one) of restraining motives. It is as if, on a level billiard-table, a ball should run into one of the pockets, not merely without being struck with the mace or cue, but in spite

of the impulse of the instrument striking it in a direction exactly opposite.

What there is of reason in the rule amounts to this :—A judge, in examining an accused or suspected person, should be upon his guard against the sinister inducements, to the action of which a man in such a situation is exposed.

The causes which may be capable of giving birth to evidence of the description in question, when it is not true, come now to be enumerated.

I. Causes capable of giving birth to untrue confessorial evidence, even when plenary.

1. Guilty of a greater crime, (*i. e.* a crime more severely punished than the crime now charged,) a man makes a confession of the crime now charged, in order to avoid the severer punishment : or, being charged with two crimes, he confesses the less, to avoid being punished as for the greater : and so in regard to facts subjecting a man to non-penal damage, or otherwise to an obligation of an unpleasant cast.

2. Not guilty of the crime charged, nor, consequently, being justly subjectable to the punishment annexed to it ; but exposed, or conceiving himself exposed, to undergo some severer suffering (whether on the score of criminality or any other) at the hands of the prosecutor, or some other man in power, to whom it would be acceptable that he should suffer as for the offence in question ; he makes confession of it accordingly, in the hope of thereby escaping such severer suffering.

Various is the description of the person by whose power, *i. e.* by the hopes and fears that point to it, a man may be drawn into a false

confession. It will depend in a considerable degree upon the nature of the offence: an ordinary offence, or a political offence. It may, accordingly, be a private individual; it may be, in a monarchy, the monarch, or one or more of his ministers; in a commonwealth, some officer or some individual invested by law or influence with appropriate power; it may be (though without atrocious abuse of judicial power it cannot be) even the judge.

3. If, in the case above supposed, — hoping, as above, to mollify the enmity of his too potent adversary, — he regards the stream of the evidence as likely to run against him, and with a force sufficient for conviction, (though this be what, by the supposition, cannot take place without falsehood somewhere); an adequate motive—a cause adequate to the production of the supposed effect, viz. that of a false confession—will in this way too be exemplified.

4. Lastly, the same effect is capable of being produced by mere confusion of mind; the state of mind producible in a man by terror—by the contemplation of his impending fate.

The case of false confession is a case which, in the present state of jurisprudence among civilised nations (including a century or so under the notion of present time), has seldom been exemplified: so at least one wishes and hopes to be able to believe, for the honour of governments and of human nature. The only instance in which it has been in any degree frequent, even for some centuries past—and in this instance it has been but too frequent—is that of a case in which the fact was not only false, but impossible. I speak of the case of

witchcraft. Turn which way we will, — to France, to England, to North America, — we shall find wretched women not only convicted, but confessing themselves guilty, of that imaginary crime. So at least say the accounts that have been transmitted to us. In these deplorable instances, in what shape has the confession been conceived? To produce a frantic cry of guilty, — to produce the mark of a trembling hand to a paper full of calumnious lies, contents known or unknown, — these are effects to the production of which confusion of mind may be fully adequate, in the instance of the weakest and most ignorant certainly not less than in that of the strongest and best-informed minds. But to produce, and produce extempore, a circumstantial and consistent account of intercourses and conversations with an imaginary being, — this would be scarce possible even to the strongest; and, if possible, where should be the inducement, when the consequence was the being hanged or burnt?

To guard against false confessions, therefore, the two following rules ought to be observed: —

1. One is, that, to operate in the character of direct evidence, confession cannot be too particular. In respect of all material circumstances, it should be as particular, as, by dint of interrogation, it can be made to be. Why so? — because (supposing it false) the more particular it is, the more distinguishable facts it will exhibit, the truth of which (supposing them false) will be liable to be disproved by their incompatibility with any facts, the truth of which may have come to be established by

other evidence. The greater the particularity required on the part of the confession, the greater is the care taken of the confessionalist,—the greater the care taken to guard him against undue conviction, brought on upon him by his own imbecility and imprudence.

2. The other rule is, that, in respect of all material facts, (especially the act which constitutes the physical part of the offence), it ought to comprehend a particular designation in respect of the circumstances of *time* and *place*. For what reason?—For there as on already mentioned: to the end that, in the event of its proving false (a case not impossible, though in a high degree rare and improbable), facts may be found by which it may be proved to be so. “I killed such a man” (says the confessionalist, mentioning him), “on such a day, at such a place.” “Impossible” (says the judge, speaking from other evidence): “on that day neither you nor the deceased were at that place.”

But time and place are both infinitely divisible. To what degree of minuteness shall the division be endeavoured to be carried for this purpose? A particular answer, that shall suit all cases, cannot be given. The end in view, as above stated, must be considered, and compared with the particular circumstances of the case, in regard to either species of extension, ere the degree of particularity proper to be aimed at by the interrogatories can be marked out. Under the head of time, the English law, in the instrument of accusation, admits of no other latitude than what is included in the compass of a day. The nature of things did not, in this instance, render uniformity impos-

sible: the parts into which *time* is divided are uniform and determinate. Place — relative space — is not equally obsequious: the house? yes; if the supposed scene of the supposed transaction be a house: the street? yes; if the scene were in a street: but a field, a road, a common, a forest, a lake, a sea, the ocean; any of these may have been the scene.

The question therefore still recurs upon us, and at the same time the difficulty of finding a general answer for it recurs undiminished. Supposing the confession — the narration — false; will the intimation which it has been made to include of time and place be sufficiently particular to enable the judge, supposing it to be false, to extract sufficient proof of the falsity of it from other evidence?

Between the degree of particularity to be looked for in the article of *place*, and the degree of particularity to be looked for in the article of *time*, there will be a mutual dependence. Supposing it clear from other evidence, that, on a given day, the confessionalist and the deceased were upwards of two days' journey distant from one another; the specification of the day on which, in the false confession, the murder is stated to have been committed, will be sufficient to prove the falsity of the confession, — to prove the non-delinquency of the confessionalist. But suppose the distance no more than two hours' journey; the specification of the day will, it is evident, not be sufficient for the same purpose. He should be called upon to fix the very hour: the hour becomes as material in this second case, as the day was on the first.

In the wording of the instrument of accusation, particularity in respect of both species of extension is insisted upon, and evidently for the reasons above given, by the English law. But, between the case of an indictment (a statement of the offence, as drawn up by an accuser), and a confession, whereby the defendant himself becomes as it were his own accuser, there is in this respect a great difference. In the case of the instrument of accusation, compliance with this requisition, however desirable, may, in respect of this or that degree of particularity, be impossible. Why?—Because, antecedently to the exhibition of the whole mass of obtainable evidence, (though ultimately that evidence should prove ever so satisfactory,) it is but natural that an accuser should be in the dark; while, (supposing the charge true, and the defendant willing to confess the fact), that same degree of particularity which it was altogether out of the power of the accuser to give to the relation, may be exhibited in the confession of the defendant without any difficulty. For from whom can so precise an account of a man's acts be expected as from the man himself, (especially acts of such moment to himself), so he be but disposed to give it?*

* That a certain degree of particularity in these respects is desirable—desirable for the reason above given,—has been sufficiently observed by the founders of this part of the English law. They therefore required, that, in the instrument of accusation, it should be observed; and so serious were they in the requisition, as to determine, that, where the requisition to that effect is not complied with, the defendant, guilty or not guilty, shall be acquitted. That causes will often happen in which, though delinquency may be capable of

being established, and by abundantly sufficient evidence, that same degree of particularity cannot possibly be exhibited,—was another observation which, true as it is, yet, at the time of establishing that requisition, they failed to make. Compliance with the requisition was impossible; but the impossibility of complying with it was no bar to the establishment of it. The requisition had not been long enforced, before the impossibility of complying with it, consistently with the conviction of the guilty, was discovered. A remedy was accordingly applied. What was that remedy?—Converting a court of penal justice into a school of necessary falsehood: a school in which the scholars were not merely taught and invited, but by main force compelled, to defile themselves with that vice: no falsehood, no justice. A day must be specified; but it need not be the true one. A day must be specified; but, that the fact happened on that day, is not necessary to be proved: another, any other, will do as well. You must say you know the day, and say what that day is: you must so know it, when you know it; you must say you know it, when you know nothing of the matter. But, provided you utter this falsehood, you shall not be prejudiced by it: from falsehood, nothing, it is from truth alone that you have any thing, to fear: speak falsely, you are safe; speak truth, you lose your cause.

This is but one instance out of a multitude, in which, by aiming at a degree of precision beyond what the nature of the case admits of, they lost the benefit of such degree of precision as the subject does admit of: they lost precision altogether: they threw away precision, and embraced falsehood in the room of it.

CHAPTER VII.

OF CONFESSORIAL AND OTHERWISE SELF-DISSERVING EVIDENCE, EXTRACTED BY INTERROGATION.

SECT. I. — *Of interrogation in general, as a means of extracting self-disserving evidence.*

INTERROGATION has already been mentioned* as the most efficient, and (in case of doubt) the indispensable, instrument for the extraction of truth,—complete truth,—in favour of whichever side of the suit it militates.

On both sides, its property is to clear up all doubts,—all doubts produced or left by other evidence,—doubts which without its aid can never be cleared up. Possessing this property, it is not less favourable to innocence than adverse to delinquency. All suspected persons who are not guilty, court it; none but the guilty shrink from it.

Antecedently to the application of this test, the mind of the judge remaining in doubt as between innocence and delinquency (viz. in which of the two opposite states the mind of the defendant shall be considered as placed), the process is directed indistinctly to the pro-

* Book II. Chap. 9.

duction of the one or the other of two opposite results:—in the case of non-delinquency, self-exculpatory testimony; in the case of non-delinquency, confessorial testimony, ending in confession.

But confessorial testimony, having punishment, or evil in some other shape, for its visibly impending consequence, does not, in the ordinary course of things, come willingly, or singly, or in the first instance. The instrument being applied, some course, on the part of the proposed respondent, cannot but be taken. Instead of this most visibly dangerous course, he betakes himself (if not definitively, at any rate in the first instance) to all other possible courses; no other course presenting to view the image of punishment as following with a step so sure. But, of all these possible courses, if the proposed respondent be really delinquent, there is not one that will not (if the judge be at the same time willing and at liberty to follow the manifest dictates of justice and common sense) operate, with a degree of probative force more or less persuasive, towards conviction: because that which is visible to common sense, as being consonant to constant and universal experience, is, that there is not one of them all that a man ever betakes himself to and persists in, in case of veracity and innocence.

True self-exculpatory testimony being by the supposition incapable of being delivered; his constant resource (were it not for the inferences which, on such an occasion, every man, as is visible to him, would draw from it) would be *silence*. But silence being in such a case, by

common sense, at the report of universal experience, certified to be tantamount to confession, though by a mode of expression as general as possible,—tantamount, at any rate, to the purpose of disrepute, if not to the purpose of legal punishment;—this is (excepting confession in particular and explicit terms) his last resource.

Thus repelled from that which would otherwise be the easiest as well as safest course, his next endeavour is to tax his invention for such statements of an exculpatory tendency, as, though false, shall present the fairest prospect of being taken, from first to last, for true. But, besides the difficulty, a defence of this kind is attended with constant and manifest peril; for no sooner does any statement present itself which, by its inconsistency with other statements of his own already delivered on the same occasion, or with facts understood from other sources of information to be true, is understood to be false, and believed at the same time to be wilfully false,—than another evidence of delinquency is afforded, still more probative and impressive, because more particular, than mere silence.

True self-exculpatory discourse is not to be had. Silence would operate as confession. Of a course of false responsion, if understood to be false, and the falsehood wilful, the effect would be still worse than that of silence. False responsion of an exculpatory tendency, in any shape that promises security against detection, not being to be found; his next endeavour is to find, and to obtain acceptance for, such discourse, as, at the same time that it affords no inculpatory evidence, shall not be liable to be

taxed with being false. Discourse of this description is that which, in respect of its object, is termed *evasive*, and in respect of its nature is either *irrelevant* or *indistinct*; for being relevant, and at the same time distinct, it could not fail to be either true or false.

If nothing of this cast be to be found, or if his employable stock of it be exhausted, he has then left but one alternative, which is either silence, as above, or confessorial evidence; which (in so far as true) it depends upon the interrogator to draw on till it terminates in *confession*.

But, after interrogation,—which (coming from a person whose station, by office or by the occasion, is that of a superior) is, in other words, an order requiring a man to speak,—silence is an act of disobedience. Confessorial discourse is the result of submission—of compliance. Of non-compliance with his will it is the property to call forth ill-will on the part of him towards whom it is manifested, especially of the man in power; of compliance, good-will. Silence, therefore, on the part of the affrighted culprit, seems to his ear to call for vengeance; confession holds out a chance for indulgence.

While devising and pursuing a plan of self-exculpativ^e misrepresentation, the discourse held by the delinquent will naturally be of a motley cast, presenting a mixture of falsehood, evasion, and truth. Falsehood, under the apprehension of the discredit which attaches instantly upon detection, will be hazarded then, and then only, when evasion seems no longer practicable, and the response, if true, could not be otherwise than manifestly confessorial.

Truth, then, will almost always form, and that in no inconsiderable proportion, a part of the delinquent's self-exculpatory tale. But such and so visible is the connexion between truth and truth—between the fact of delinquency and all the several facts that have accompanied or led to it,—that, of the admixture of truth thus unwillingly inserted, a portion more or less considerable, (in one way or other, with or without his knowledge), though designed to operate in a way opposite to confession, will operate in effect in the character of confessorial evidence.

And thus it is, that,—by one and the same process, the process of interrogation,—(where the respondent who is suspected to be a delinquent is really so),—in spite of, and in consequence of, the endeavours used by him to impress the persuasion of his innocence,—silence or non-responsion, evasive responsion, false responsion, confessorial responsion, (one or all of them, in infinitely diversifiable proportions), will be extracted: each of them contributing to conviction; each of them evidentiary of delinquency,—operating in the common character of self-disserving, to wit, self-inculpatory, or self-criminative, evidence.

In species and denomination, the infirmative considerations applicable to self-disserving evidence thus extracted by interrogation, are the same as those applicable to evidence from the same source and of the same tendency, when delivered without interrogation.

But, in respect of force, they are, in every instance, decidedly inferior. Why?—Because, in every instance, the infirmative considerations are mere suppositions,—suggestions of states

of things neither proved nor so much as probabilized, but merely brought to view as being at the same time possible, not glaringly improbable, and not disproved, in whatsoever degree disprobabilized.

But, of the process of interrogation, by whomsoever performed (if performed with an impartial view, or, what comes to the same thing, with partial views on both sides), it is the known object and effect, by the most efficient means, to clear up all such uncertainties.*

* Of the mode of signifying *will*, denoted by the word *interrogation*, the object is to obtain, at the hands of the person interrogated, some token, such as, in relation to the particular object on the carpet, shall serve to express and make known the state of his mind. But interrogation—interrogation in mood and figure—is not the only mode of communication, is not the only form of discourse, by which an effect of that description is capable of being accomplished.

When, two other persons being present, Titius hears (being at the same time known to hear) one of them, in discourse with the other, speak of him (Titius) as having done such or such an act, in relation to which it concerns him in point of interest to be thought to have done it or not to have done it,—to have engaged, for example, in a plan of delinquency, in this or that shape, or (delinquency out of the question) to have made a promise, a deliberate promise, intended to be binding, to such or such an effect;—if it be material to him not to be believed to have done that which he is so stated to have done, he feels himself of course called upon to contradict the assertion: called upon with a force neither greater nor less than if an interrogatory to the same effect had been addressed to him.

On a former occasion (that of suggestive interrogation), we have seen interrogation involving in it a proposition of the assertive kind (Book III. EXTRACTION, Chapter 3): here we see an assertion standing in the place, and performing the function, of an interrogatory; so variable and interchangeable are the different forms of language.

It is not, however, to any such oblique and uncertain modes of signifying will, that the mouth of authority—judicial authority—will naturally, or even consistently, have

SECT. II.—*Difference, in point of effect, between extra-judicial and judicial interrogation.*

COMPARED with each other, self-inculpative evidence extracted from a supposed delinquent by extra-judicial interrogation, and evidence of the like denomination extracted by judicial interrogation, have their natural points of advantage and disadvantage, the observation of which is pregnant with instruction of practical use.

recourse. Accordingly, where, in the character of a security (a judicial security) for correctness and completeness in a mass of evidence, *interrogation* was brought to view, no mention of any such oblique mode of interrogation as is here denoted by the term *quasi-interrogation*, was *there* made.

In a sort of cases the description of which in general terms may not be easy, but which are little exposed to misconception in any individual instance, silence is to a proverbial degree recognised to be equivalent to consent or assent: to consent, if the effect of the quasi-interrogation be to call for an expression of will; to assent, if it be to call for an expression of the state of the intellectual faculty.

To produce on the part of the person in question a call for a declaration of the state of the will, or of the understanding, as the case may be,—a call no less imperious than that which would have been produced by interrogation, — it is not necessary that the quasi-interrogative discourses should have been directly addressed to him; or that, on the part of the quasi-interrogator, there should have existed so much as a desire to obtain an answer, express or virtual, from the person thus indirectly interrogated. What is material to him, is to be believed, or not to be believed, to have done, or to be doing, or to be about to do, what by the discourses in question it is supposed and assumed that he has done, is doing, or is about to do. Whether, on the part of the author of that discourse, there exists any desire to be *informed* in relation to such his supposed conduct, past, present, or future, may to him be a matter of indifference: the interest which he has in being believed so to have done, or not to have done,—the call made upon him accordingly in point of interest to declare yes or no,—is not varied by any such difference.

1. To extra-judicial interrogation, considered as an instrument for the extraction of truth from unwilling lips, belong naturally two disadvantages: comparative deficiency in respect of coercive power; and comparative deficiency in point of intellectual skill.

Of these disadvantages, however, neither is constant in point of existence, or uniform in degree.

The interrogator is not indeed himself the judge, — the judge by whom the decision, grounded on the evidence so extracted, is to be pronounced. But on this head (unless where, in virtue of some particular connexion, the supposed delinquent is, by sympathy or any other cause, assured of concealment on the part of his interrogator), the difference will not be very considerable; inasmuch as every question will naturally present itself as if backed by the authority of the judge.

2. In the process of interrogation, the casual interrogator will not in general possess experience, nor (so far as depends upon experience) skill, equal to what may be naturally expected on the part of the judge. But, in this respect, the father or other head of a considerably numerous family, will not in general be much behind even an official judge: and whatsoever superiority in point of acquired skill may be expected to have place on the part of the official judge, the superior interest and zeal that may no less reasonably be looked for on the part of the domestic interrogator may be considered as forming in general no inadequate compensation.

On the other hand, in the circumstance of

surprise may be seen a circumstance from which the situation of the domestic interrogator will be apt to derive a considerable advantage. From the domestic inquirer may come a question, or string of questions, at a time when no thoroughly-considered plan of mendacious defence can as yet have been adjusted; whereas the interval between arrestation and judicial interrogation will afford for the purpose of mendacious invention (not to speak of mendacious suggestion in case of concert amongst co-delinquents) a quantity of time over and above whatsoever in the same individual case the delinquent could have applied to the purpose of his defence against the casual inquisitiveness of extra-judicial interrogators.

One great, and, as it should seem in general, decisive, advantage, attaches beyond dispute to the side of the judicial interrogator. It rests with him to continue the process of interrogation, (that is, to keep the supposed delinquent in a state of subjection to it,) for whatever length of time appears to him to be necessary and sufficient for the purpose,—for the extraction of whatever mass of evidence the proposed respondent is looked upon as capable of yielding,—for the extraction of it in all its plenitude.

On this occasion, there are four distinguishable objects with which self-disserving evidence extracted by judicial *vivâ voce* interrogation will require to be compared; the evidence being in all four cases supposed to issue from the same source (*i. e.* from the same individual), and to be of the same tendency: viz. 1. evidence delivered extra-judicially, and without interrogation, by word of mouth; 2. evi-

dence delivered extra-judicially, and without interrogation, in a written form; for instance, in the form of a private memorandum, or of a letter, sent or not sent; 3. evidence delivered extra-judicially, in consequence of interrogation by word of mouth; 4. evidence delivered extra-judicially, in consequence of interrogation in a written form.

Expressed in the written form, the evidence, taken in itself, is more apt to be incomplete; and in such a way incomplete, as, in respect of partiality, to be deceptitious. Why?—Because on the occasion of writing, the writer (the supposed delinquent) has in general more time at command for the purpose of mendacious invention; nor are the workings of his invention in a situation to receive that disturbance which it is natural they should receive, from the presence of a person at whose hand hostile suspicion (or at any rate prying curiosity) and consequent interrogation, whether eventually applied or not, will naturally be apprehended.

When delivered in the form of a letter, the person to whom the statement is addressed must, for a length of time at least, take it as it comes. Delivered orally, no sooner are gaps discovered in the texture of it, than comes a question requiring them to be filled up; no sooner ambiguity or obscurity, than the clearing of them up. Self-regarding evidence, delivered by a delinquent in the written form, will, therefore, be more likely to be deceptitious, *i. e.* guarded against detection, and so effectually as to produce the deception aimed at by it: viz. where deception was an object which it had in view. But in some cases it has no such object; as

when the cast of it is conspiratorial, simply confidential, or jactitantial.

At the same time, such as it was delivered—delivered from the mind of the writer,—such, and without alteration, without being exposed to be *misreported*, it is sure to be presented to the mind of the judge: whereas, if delivered in the oral form, it will always be liable to alteration,—liable to be misreported by the deposing witness, through the channel of whose lips (it being extra-judicially delivered in the first instance) it cannot but have passed.

As to interrogation in the written form; (as when statements which have been extra-judicially delivered have eventually been made use of as evidence, and thereupon have assumed that responsive form of which interrogation, when submitted to, is naturally productive);—it is a possible case, but a case not by any means likely to be frequently exemplified; rarely indeed, when compared with the form which discourse so readily assumes under the process of interrogation when performed by word of mouth. Why?—Because, out of the presence of the interrogator, compliance with the command expressed by interrogation, is, if irksome, refused without difficulty: evasive responsion, if responsion be resorted to, is more easy: silence, being liable to be accounted for by so many other causes besides delinquency, is resorted to with less reserve. A plan of self-exculpative mendacity is pursued with more time for the continuance of it, and with better promise of success; and, from amongst the truths which, to guard against detection, it may be necessary to intermix, a selection is made with greater

facility and safety, of those which (for fear of their being found to operate with a self-dis-serving, a self-inculpativè tendency) require, and may (it is supposed) bear, to be omitted.

Of discourse orally delivered it is moreover the nature, when the apprehended tendency of it is (as here) self-criminative, to bring with it another species of criminative circumstantial evidence (which will be brought more particularly to view in another chapter), viz. *fear*, as indicated by deportment, more particularly passive deportment; and from an accompaniment thus treacherous it is a characteristic property of written discourse to be altogether free.

Meantime, howsoever (being orally delivered) the evidentiary self-criminative discourse may have been accompanied with any such symptoms, in the state in which on the extra-judicial occasion it was delivered to the percipient witness (interrogating or not interrogating), by whom, in the character of a deposing witness, it is reported to the judge;—yet, when thus reported to the judge, it comes accompanied, not by the symptoms themselves, but only by the report so made of them: to which report it may happen to be in any degree incorrect or incomplete, or both.

Of the comparative view thus taken, what is the practical result?—Not preference, followed by adoption and rejection, but conjunction. Each mode and form is marked by its peculiar advantages, counteracted by its peculiar disadvantages: both, therefore, should be called in to the assistance of justice.

Expressed originally, whether in writing or in conversation, the probability is that the evi-

dence in question, (especially being, as it is, self-regarding, and subject to the risk of being found self-criminative), will abound with gaps, with dark passages, with broken hints. All these imperfections, the judge, and he alone, is competent to do what can be done towards remedying. In his hands alone is reposed adequate power, and whatsoever time, in his view of it, the occasion needs.

Self-inculpative discourse, when it is uttered extra-judicially (designedly or undesignedly, with or without a view to its being employed as evidence), can never be an adequate succedaneum to judicial confession, the plenitude of which is secured by judicial examination. In the former case it is not itself the proper evidence; it is no more than indicative of the source from whence conclusive evidence may by the proper process be obtained, and of a sample of what may be expected from that source. It is not the best, the most satisfactory, evidence that the case furnishes; it shews where better, where still more satisfactory evidence, is to be had: and it may require completion and explanation (not to speak of opposition and confutation), not only for the benefit of the party by whom it is produced, but even for the benefit of the party whose confession it is, and *against* whom it is produced.

But although it be thus indicative of a lot of evidence more satisfactory than itself, the use of the inferior is not always superseded by the superior evidence.

1. A case that happens not unfrequently, is this:—after a true confession more or less full,

delivered extra-judicially,—when the confessionalist comes to be examined in a judicial mode, he repents, and, instead of confirming the truths he has disclosed, betakes himself to falsehood. When the extra-judicial confession was suffered to escape from his lips, the debt thus paid to truth had the confusion of mind he had been thrown into for its cause : his presence of mind regained, he endeavours to avail himself of it, and attempts to take back the lights that had transpired from him when off his guard. As one man is confronted with another, the interests of truth and justice require that, in such a state of things, a man should be confronted with himself. The extra-judicial confession may be consistent with facts established from other sources : the judicial retractation may be alike inconsistent with the extra-judicial confession and with these established facts. The extra-judicial confession may obtain credence : the judicial retractation may with reason be disbelieved.

2. Even when the two lots of information accord,—when the extra-judicial confession, instead of being contradicted by a judicial retractation, is confirmed by a judicial confession,—the extra-judicial confession may be not altogether without its use. The first confession giving confirmation to the second, as well as receiving confirmation from it, may serve to render more complete the satisfaction of the judge.

3. Where the judicial confession accords with the extra-judicial, the utility of it will be still more apparent, in the case where both of them happen to stand contradicted by other evidence.

How should this happen? (it may be said.) The defendant has himself acknowledged the offence — acknowledged it once and again: what hope can remain to him to overthrow the effect of this double acknowledgment by inferior evidence? of the two acknowledgments, by evidence that is not a match for either? — To him, to the same man, not. But a case that may happen, and does happen not unfrequently, is — the evidence that a man gives against himself applies with equal pertinency to the case of another man; say, as in a criminal case, an *accomplice*. The confessionalist acquiesces, as he cannot but acquiesce, in the consequences of his confession thus repeated and confirmed. But the second accomplice, having his separate plans of defence, having hopes where his confederate has none, denies the truth of the confession, and seeks to combat it by other evidence.

4. Lastly: Another case that may happen, and which will on another occasion* be brought to view is, — after furnishing the extra-judicial evidence, and before there has been time or opportunity for following up the indication by judicial examination, the confessionalist dies, or ceases to be forthcoming. By his death, the possibility of inflicting punishment (punishment rightly seated) ends; and therefore, so far as punishment is concerned, there the cause ends; and therefore the demand for other evidence, for judicially-extracted oral evidence, along with it. As to punishment, yes; and therefore

* See Book VI. MAKESHIFT, Chapters on *casually-written* evidence and *hearsay* evidence.

as to causes in which punishment, and nothing but punishment, is or ought to be demanded.* But as to satisfaction, the demand for decision may remain, and therefore (for the purpose of a decision on that ground) the demand for evidence. While the confessionalist was alive, his extra-judicial confession was, in comparison with his judicial deposition (if subsequently taken), but an inferior kind of evidence. The source, however, of the superior evidence being dried up by death, the inferior, the extra-judicially confessorial evidence, takes its place,—a species of evidence which, howsoever inferior to the confessorial part of the judicial evidence from the same source, is, as far as it goes, superior (as we have seen) to every other species of evidence.

Thus far as to penal cases. In cases not penal, the necessity of employing it is still more evident.

The necessity of treasuring up and employing this species of extra-judicial evidence will be equally evident, where the completion of the confession, by the judicial examination of the confessionalist, has been rendered impracticable for a period, determinable or indeterminable, but not known to be perpetual, such as absconsion or expatriation.

So much for the importance of interrogation, as applied to the extraction of self-disserving evidence from the suspected delinquent.

No supposition surely can be more unnatu-

* That is to say, in cases which afford no individual specially injured.

ral than this, viz. that, if discovery of truth, and consequent rendering of justice, had been the object, the use of an operation so necessary to the discovery, so obviously and indispensably subservient to the purposes of justice, would ever have been rejected. But, under the technical system, the interests and ends of judicature being, from first to last, opposite and hostile to the interests and ends of justice; whatever exertion and ingenuity has been bestowed, is applied, not to the discovery of truth, but to the finding of pretences for not discovering it: not to the administering of justice, but to the finding of occasions and pretences for administering injustice in its stead.

Governed, if not by sinister reason, by blind caprice, under the mask of tenderness; English lawyers, admitting self-disserving evidence when supposed to have been extra-judicially delivered or extracted, forbid it to be judicially extracted or received,—extracted by the judge by whom the decision is to be formed. Receiving it in an incomplete state, they will not suffer it to be completed. Receiving it in the state of hearsay evidence, they refuse to receive it in the state of immediate unaltered evidence. Receiving it in a variety of bad shapes, they refuse to receive it in what, by their own uniform acknowledgment, is the best.*

Tenderness!—to whom? To the innocent individual, maliciously or erroneously accused? No: what it does for him is, where misrepresentations have taken place tending to his un-

* See Book IX. EXCLUSION.

just conviction, to refuse him an opportunity of clearing them up.

To the guilty? No, not even to the guilty, considered in the aggregate. By the promise it gives of escape, it augments the number: the number being so great, thence comes the pretended necessity, the factitious demand, for excessive punishment: the deficiencies in certainty must be made up in magnitude. Death is the English judge's universal remedy: higher he cannot screw up the exertions of blind barbarity. To this point the labour of every session adds: at this a stop is made, because there is nothing beyond it.

It is the part of the same man, the same natural and implacable enemy of justice,—on the one hand, to keep watch and ward in favour of the murderer, charging him not to let drop any the least hint from which justice may receive assistance, not to say any thing by which his guilt may be brought to light; and, on the other hand, to be no less active in his exertions to extend the demesnes of death. To the profit of cold barbarity, he adds the praise of tenderness. The manly dictates of public utility are sacrificed to the cant of hypocritical or childish sentimentalism. The excess of the punishment becomes a sufficient warrant for not executing it. Extending the demesnes of death, he thus extends the mass of his own despotism: of that preposterous state of things by which, every year, the lives of men, by dozens and by scores, are laid at the feet of every English judge.

CHAPTER VIII.

OF CONFUSION OF MIND, CONSIDERED AS AFFORDING EVIDENCE OF DELINQUENCY.

ANOTHER modification of subsequential circumstantial evidence is *confusion* of mind: confusion, as expressed and betrayed whether by countenance, by discourse, by conduct, or by all three. This may also be considered as a sort of sub-modification of circumstantial evidence; a modification of confessorial evidence: with this difference only:—Confessorial evidence is personal evidence; confusion of mind is *real* evidence:—The presumed state of mind, the state of mind evidenced by the external indications, is *psychological* real evidence; the indications themselves, *physical* real evidence.

Hesitation alone,—hesitation without confusion,—would be misinterpreted if it were looked upon as an indication of falsehood; much more if of wilful falsehood. Hesitation has for its cause,—its most natural and frequent cause,—anxiety to shape the narrative by the exact line of truth, accompanied with a difficulty a man experiences in his endeavours to accomplish it. Correct memory, and adequate expression, are both necessary to this end: by the consciousness, or even mere apprehension, of

failure in either article, hesitation may be produced.

The most careless and least scrupulous of witnesses are frequently among the most fluent.

Suspicion indeed is not altogether without ground, when, to hesitation, confusion is added. Confusion is the result of consciousness of manifested inconsistency, of inconsistency with itself or with indubitable truths,—a repugnancy which is among the surest indications and proofs of falsehood: but, of any such inconsistency, a man who means nothing but the truth is not in much danger of labouring under any serious apprehension. The truth, and nothing but the truth, is what, by the supposition, he means to hold up to view. Truth cannot be inconsistent with itself: two truths, parts of one and the same complex truth, cannot be inconsistent with each other. Truth, in all its parts, is the one thing, and the only thing, his memory is in search of. In regard to some parts, at any rate, he is singularly unfortunate if he cannot make sure to himself of possessing it: these parts he will at any rate adhere to. Others, of which his hold is not so strong, he will adhere to no otherwise than upon the supposition of their being compatible and consistent with those fundamental stronger ones. Should any inconsistency display itself, he will abandon these weaker points, without difficulty and without confusion, that is, without shame or other fear: having nothing to suffer from the temporary mistake, — no point of his own to lose by it.

Confusion affords a presumption, more or

less strong, of the fact contested by the party ; but not absolutely a conclusive one. It proves alarm ; and, in the case in question, the most natural cause of alarm is the apprehension of seeing the contested fact taken for true. But this, though in the sort of case in question the most frequent and natural cause of the alarm, is by no means the only one.

1. It may be, that, — although the fact in question, the fact contested by the party, was not true, — yet some other fact, the declaration of which would in some other way be prejudicial to him, was true : and the alarm was produced by the apprehension of seeing this other fact brought to light.*

2. It may be, that, in respect of the fact in question (the offence in question,) appearances are against him, notwithstanding his perfect innocence ; and the consciousness of this circumstance may be the cause of his confusion.

* Bolingbroke, after his partial pardon and return to England, being suspected of harbouring a person accused of a state crime ; his house, and even his bed-chamber, as he was lying in his bed, were searched by the ministers of justice. Traitorous bedfellow with him he had none : a bedfellow, however, he had ; a female, whose reputation would have been ruined by the disclosure. Confusion, more or less, he could not but have betrayed. Had the search ended there, this confusion would naturally and properly have been regarded as circumstantial evidence of the crime he was suspected of. His presence of mind saved him from that mischance. Uncovering enough of her person to indicate the sex, without betraying the individual, he preserved himself as well from the imputation of the crime of which he was not guilty, as from the collateral misfortune which that imputation was so near bringing on his head.

CHAPTER IX.

OF FEAR, IN SO FAR AS INDICATED BY PASSIVE DEPORTMENT, CONSIDERED AS AFFORDING EVIDENCE OF DELINQUENCY.

A CLASS of cases has already been brought to view,* in which the principal fact in question (*viz. delinquency* in this or that shape) cannot be probabilized by the evidentiary fact deposed to before the judge, without the intervention of some other fact or facts, constituting, together with the principal fact and the evidentiary fact, an evidential chain of a peculiar nature. The case where fear, howsoever supposed to be manifested, is the fact considered as evidentiary of delinquency, belongs to this class.

In a chain of this sort, the number of links will be different, according as it is to the perceptions of the judge himself, or to those of some other person by whom in the character of a deposing witness it is reported to the judge, that the fact here considered in the character of an evidentiary fact (*viz. fear*) presents itself.

First, suppose the judge himself the person

* Chap. I.

to whose senses the fear (*i. e.* the appearance of fear) manifests itself. The links of the evidentiary chain will then succeed one another in the manner following, viz.:—

1. Link the first; (group of evidentiary facts immediately presented to the senses of the judge), symptoms of fear. These, being objects of sense, must all of them be such as come under the description of *physical* facts.*

* The physical symptoms with which the emotion of fear has been known to be accompanied, and of which it may be considered as productive, may be thus enumerated. But amongst them are some which seem indicative of a degree of emotion so high as to be seldom, if ever, produced by the fear of an evil so distant, and so far from being certain, as the evil of a punishment which for its infliction depends on the hand of law.

In some of these instances, the individual is purely passive; no voluntary action, no exertion of the will being necessary, nor, in some of the instances, so much as competent, to the production of the physical symptom.

- | | | |
|---------------|---------------------|-------------------|
| 1. Blushing. | 1. Sweating. | 1. Weeping. |
| 2. Paleness. | 2. Involuntary | 2. Sighing. |
| 3. Trembling. | evacuations. | 3. Distortions of |
| 4. Fainting. | | the countenance. |
| | | 4. Sobbing. |
| 1. Starting. | 1. Exclamation. | |
| 2. Pacing. | 2. Hesitation. | |
| | 3. Stammering. | |
| | 4. Faltering of the | |
| | voice. | |

In some of the above instances the physical symptom is altogether independent of the will, it being altogether out of the power of the will to give birth to it. In other instances, though the production of it is not altogether out of the power of the will (and is accordingly effected without the existence of the emotion, in theatrical imitations), it either takes place without the action of the will, or becomes the cause of the action of the will before it becomes the effect of it.

Of these symptoms, several will be seen to be common to the three emotions of fear, grief, and anger: some of them to

2. Link the second, — the emotion of *fear*: a psychological supposed fact, inferred and supposed to be probabilized by these physical appearances; — fear, having for its supposed cause the expectation of the evil consequences (legal punishment included) considered as attached to the offence in question, by means of the ensuing links.

3. Link the third, — self-inculpativè recollection: the memory of the supposed delinquent presenting to him the wrongful act as having been committed by him; viz. the physical act, positive or negative, accompanied with its criminative circumstances.

4. Link the fourth, — the criminal act itself, as above.

In an evidentiary chain of this sort it has been already mentioned as the principal use of, and reason for, the operation of distinguishing link from link, that to each link belongs a distinct set of infirmative considerations, capable of operating in diminution of its probative force. The truth of that observation will be found exemplified in the present instance.

In this case, the chain of inference by which these four distinguishable links are connected stands thus: — 1. From the physical appearances, regarded as symptoms of fear, — the existence of that emotion is inferred: 2. from the supposed existence of that emotion, — the

result more naturally from either of those other emotions than from fear.

Physical phenomena of this kind, in so far as they point whether to fear or any other emotion as their psychological cause, may be distinguished by the common appellation of *pathological* evidence.

existence of the criminative recollection above mentioned : 3. from the existence (viz. the present existence) of that recollection, — the existence (viz. the past existence) of the criminative fact itself.

In relation to the second of the above three inferences, what must be observed is, that, for the purpose of forming the inference, the nature of the *occasion* is an object that must indispensably be called in ; since, but for this, even supposing *fear* to be the emotion sufficiently established by the symptoms, this emotion might have had any other cause than the particular cause thus ascribed to it.

But for the *occasion*, the probative force of this circumstance would scarce amount to any thing : add the occasion, and of itself it cannot but be very considerable. Infirmative considerations there are, as will be seen, to the disprobabilizing force of which it stands exposed ; but of these, of all these taken together, the disprobabilizing force (it will be seen) will not in general be very considerable.

The *occasion* here in question is the circumstance of the supposed delinquent's being taxed with, or being supposed by himself to be suspected of, the particular act of delinquency in question : the existence of which occasion is always part of the case.

The second link is constituted, therefore, properly speaking, not of the fear alone, but of the fear combined with the occasion ; since it is by the occasion that the existence and operation of those other possible causes, which will be brought to view in the character of infirmative possibilities, will be rendered improbable.

It is with this psychological sort of chain, as with a physical one : the chain is the weaker, the greater the number of links which enter into the composition of it. Why? Because each link brings with it its particular infirmative possibilities.

I. Inference forming the joint or connexion between link the first, viz. physical supposed symptoms of fear, and link the second, viz. the emotion of fear itself.

Infirmative possibilities applying to this joint : —

1. The cause of the appearances different : a purely *physical* fact, viz. bodily indisposition.

2. The cause of the appearances different : a psychological fact, indeed, and that an emotion, but a different emotion, such as grief or anger : grief or anger produced, for example, by the consideration of the wound inflicted on reputation, notwithstanding innocence.

II. Inference forming the connexion between link the second, viz. the existence of the emotion of fear, and link the third, viz. the existence of a criminative recollection, having for its subject the particular offence of which the supposed delinquent understands himself to be accused or suspected.

Infirmative possibilities applying to this inference : —

1. Recollection criminative indeed, but not in the way in question : recollection of an offence committed, but an offence different from that of which the supposed delinquent stands accused or suspected.

2. Recollection of an offence committed, not by the individual himself, but by some other

individual connected with him by some tie of sympathy, and in whose instance the inquiry, it is apprehended, may be productive of conviction or suspicion.

3. Recollection of a fact by means of which, without any delinquency on his part, vexation has been, or appears likely to be, produced, in this or that shape, to himself,

4. — or to another person, or even a class of persons, more or less extensive, connected with him by some tie of sympathy.*

5. Apprehension of punishment, notwithstanding innocence. Of this infirmative probability the disprobative force will depend, it is evident, in a considerable degree, upon the general complexion and character of the system of procedure under which the inquiry is made.

6. Contemplation, prospect, of the vexation attached to prosecution, notwithstanding innocence: another circumstance the infirmative force of which will be seen to depend, more or less, on the system of procedure.

III. Inference forming the connexion between link the third, viz. supposed recollection of the criminative fact in question as committed by him, and link the fourth, viz. the actual commission of the act so supposed to be recollected.

Infirmative possibility:—

Falsity of the supposed self-criminative recollection.

* “Infandum, Regina, jubes renovare dolorem.”

Æneas was not upon his trial: but the emotion here was not fear, but grief.

“—— Quis talia fando

“Temperet à lacrymis?”

The error here supposed will present itself as being of a nature not very apt to be realised. It is capable, however, of taking place, not only in case of mental derangement, but in the case of habitual delinquency; especially if the time of the supposed offence be very remote.

Apprehended and examined, though for a theft in which he had no part, an habitual thief will naturally enough exhibit symptoms of fear; and, confounding one of his exploits with another, may suppose himself to recollect a theft in which in truth he bore no part.

Such are the conceivable facts which, in the character of infirmative probabilities, apply to the criminative force of fear, when the symptoms of it apply themselves without the intervention of any other medium to the senses of the person by whom, in the character of judge, the conclusion is to be formed,—the decision grounded on them formed and pronounced.

If, instead of the phenomena themselves being presented to his senses, what is presented to him is but a report made concerning them by some other person, by whom they are stated as having been presented to his senses; the probative force of them stands, in that case, subject to the infirmative operation which attaches upon supposed *unoriginal* evidence, as compared with the original evidence itself: an infirmative circumstance of the same nature as that by which (according to a distinction already noticed) supposed real evidence *reported* is distinguished from the real evidence itself; and of which a more detailed view will be given in the next succeeding Book.

To the additional joint added to the evidentiary chain by the presence of this fifth link, the following circumstances present themselves as applying in the character of infirmative possibilities:—

1. Possible untrustworthiness, (whether in respect of moral or intellectual qualifications,) on the part of the reporting witness; viz. the supposed percipient witness, speaking in the character of a deposing witness.

2. Impropriety of the shape in which his testimony was received or extracted.

If to the deciding judge this testimony be presented not in the oral but ready-written form,—3. Inaptitude, whether in respect of moral or intellectual qualifications, on the part of the receiving or extracting judge.

CHAPTER X.

OF CLANDESTINITY, CONSIDERED AS AFFORDING EVIDENCE OF DELINQUENCY.

UNDER this class of criminative circumstantial evidence, may be noted the following distinctions, viz.

1. Clandestinity, by concealment of the forbidden act or principal fact itself: for example, by doing in the dark what, but for the criminal design in question, would naturally have been done in the day: or choosing a spot which is supposed to be out of the view of every body, for doing that which, but for the criminal design, would naturally have been done in a place open to observation.

2. Clandestinity, by concealment of the *person* of the supposed delinquent while occupied in the act: as in the case of disguise.

3. Clandestinity by concealment of the *part* taken by the supposed delinquent in the commission of the act—in the production of the mischievous result: concealment, for example, of the *purpose* for which the act, viz. the physical act is performed; as, in the case of murder by poison, the several acts by which the poison is prepared, or put into the hands of, or recommended to be taken by, the person intended to be poisoned.

4. Clandestinity, by *eloignement* or deception of witnesses to the act: exertions employed for removing this or that person from the scene of the intended unlawful action; under the supposed apprehension of his becoming (in relation to the forbidden act, its accompaniments, or consequences) a percipient, and thence eventually a deposing, witness.

5. Clandestinity, by *eloignement* or concealment or destruction of criminative *real* evidence. Concerning the modifications of real evidence, see above, ch. iii.

6. Forgery in relation to real evidence: viz. either by fabrication of exculpatory appearances, or by alteration of inculpatory into neutral or exculpatory. The modifications of which it is susceptible correspond of course with those of real evidence.

Disguise of the person, a mode of clandestinity already brought to view, may be considered as a modification of forgery in relation to real evidence.

On the preceding occasion,* forgery in relation to real evidence was considered as capable of being practised by others, to the prejudice of the supposed delinquent: here, it is considered as practised by him. There, it was an infirmative, an exculpatory probability: here, it is an inculpatory fact.

Being a mode of deception, effected or attempted, — a species of falsehood, — and, as such (no less than forgery in relation to written evidence) a modification of the *crimen falsi* of the Roman school, — falsehood uttered by deportment; it is in that respect closely allied to falsehood in the same intention uttered by discourse.

* Chap. iii. sect. 5.

It may be moreover considered as being, in relation to real evidence, that which *subornation* is to personal. As in the one case, so in the other, objects of the class of *things* are thus pressed into the service of delinquency.

7. Opposition to search made for real evidence. See the next chapter.

Clandestinity, in what manner soever aimed at, may be considered as evidentiary of fear: and in that way, and that way alone, (through the chain of inferences of which that emotion constitutes, as above, the principal link,) constituting a circumstantial evidence of delinquency in this or that shape, as explained by the occasion, as above.

In the case of *fear*, as above explained, the emotion itself, the psychological (and that a pathological) fact, constitutes but the second link in the evidentiary chain: the first link was constituted by the physical symptoms from which that psychological fact is inferred. In the case of *clandestinity*, under the several modifications as above enumerated, the positive voluntary physical acts by which the concealment is effected or endeavoured at, stand in the place of the involuntary appearances, the pathological symptoms, by which, in the other case, the emotion is betrayed.

1. Intention, or design, differently, but equally, or more, culpable; 2. Intention or design less culpable; 3. Intention or design blameless, though requiring secrecy.* These are among the infirmative counter-probabilities

* Love, as well as criminality, seeking clandestinity, servants' lovers are apt to be taken for thieves: thieves, on their part, endeavour to pass for lovers.

which have just been seen, in the case of fear, applying to and weakening the probative and criminative force of that emotion: they may here be seen applying with equal force to the criminative force of clandestinity, in these its several shapes.

To the probative force of the inference, which, in the case of *fear*, binds together the two first links (viz. the aggregate of the physical or pathological symptoms, and the psychological emotion), two infirmative counter-probabilities were seen applying themselves; viz. 1. the emotion different, (for example, grief or anger); and 2. the cause of the physical symptoms, not psychological, but purely physical, viz. bodily indisposition.

In the case of clandestinity, in the place of those infirmative counter-probabilities stands another, characterizable by the word *sport*: the clandestinity having for its object and its cause, desire of producing sport, merriment, pastime; and not delinquency in any shape.*

At the end of a judicial investigation, it does not often happen that, in a case of clandestinity, the decision, as between sport and criminality, can be attended with much difficulty. But, for want of timely explanation, sport indiscreetly pursued has every now and then been itself an object of pursuit, when thus enveloped in the livery of guilt. A man who endeavours to pass for a ghost, risks the being taken for a thief, or something worse.†

Forgery in relation to real evidence, has an

* See, once more, the story of Joseph and his brethren.

† In the vicinity of London, not many years ago, a ghost of this sort was shot dead, and the shooter tried for his life.

infirmative counter-probability peculiar to itself; viz. self-defence: the individual innocent, exertions made to remove physical appearances, which (whether produced by nature or by human malice, viz. in the way of forgery) tend to fix a criminative imputation on him, in the circumstances in which he happens to be placed.

In the view of removing the imputation from himself, a murderer has been known secretly to deposit in the apparent possession of an innocent person the blood-stained instrument or garment, or some other such article, so circumstanced as to operate in the character of a source of criminative real evidence. In this case, were it the lot of the innocent man to be observed in the night time retransferring the articles to the place from whence they came, it is to him, instead of the murderer, that the artifice might thus come to be imputed.*

* See, again, the story of the Little Hunchback. A body, supposed to be dead, is transferred from neighbour to neighbour, always with the utmost secrecy, under the apprehension of the suspicion that might be produced by it, in the event of a visit from the officers of justice.

CHAPTER XI.

OF SUPPRESSION OR FABRICATION OF EVIDENCE, CONSIDERED AS AFFORDING EVIDENCE OF DELINQUENCY.

SUPPOSING the whole mass of evidence actually suppressed, no such discussion (it is evident) can have place, as the inquiry concerning the probative force belonging to any part of it, or the circumstances, by the consideration of which, that force may be diminished.

But, under the head of these several modifications of criminative circumstantial evidence considered as deducible from active deportment, the attempt, successful or unsuccessful, is to be understood: for it is by the attempt, successful or unsuccessful, that the state of the mind is indicated; and it is from the state of the mind, that the criminative inference is (not less properly than naturally) deduced.

Preventing as it were the *birth* of evidence, by preventing from becoming witnesses (*i. e.* *percipient* witnesses) those by whom that character might otherwise have been acquired, is a criminative circumstance already brought to view, viz. under the head of clandestinity. The circumstances in view under the present head, are such as are capable of taking place at a more advanced stage of the business, viz. at any

point within the length of time intervening between the moment in which the offence is considered as having been committed, and the moment at which the evidence produced in consequence of prosecution comes to be delivered. The mal-practice here in question is, therefore, any act whereby a person who, in relation to any criminative fact in question, has already been in the condition of a percipient witness, is prevented, or is endeavoured to be prevented, from appearing in the character of a deposing witness. But to draw, for the separation of the two objects, a clear line of distinction applicable to all cases, would be found impossible.

Under one or other of the two general heads here mentioned, the following specific modifications of circumstantial criminative evidence seem comprisable:

1. Destruction, concealment, eloignement,*

* *Eloignement*, a word adopted from the French into English law language, is wanted, together with its conjugates *eloigner*, to *eloign*, in current language. For *eloigning* a man, the general stock of the language has no better expression than *getting him out of the way*.

Tampering, viz. with evidence, is a term applied as well to the endeavour to intercept oral testimony, with the consent of him who should have delivered it, as to the endeavour to procure by subornation false testimony, from one who otherwise would not (it is supposed) have delivered any testimony at all, or would not have delivered other testimony than what was true.

Labouring and *embracing* are words used in law language as synonymous with *tampering*, but only where the persons tampered with are considered as invested, or about to be invested, with the character of jurymen.

By *tampering* seems to be meant, an endeavour to cause the person in question to act, on the occasion in question, any part contrary to what is considered as being his duty with re-

or falsification of any already existing source of real or written evidence, tending or supposed to tend to the inculcation of the supposed delinquent.

2. Interception of evidence, oral, real, or written. Measures taken to prevent the forthcomingness or delivery of the evidence of a person whose testimony, in the character of a deposing witness, would tend, as supposed, to the inculcation of the supposed delinquent; or the evidence deducible from the written document, or other thing capable of operating in the character of a source of written or real evidence: *ex. gr.* by obstacles thrown in the way of whatever antecedent operations may be necessary to the delivery of it.*

3. Subornation: causing a person to deliver false testimony, tending to the exculpation of the supposed delinquent.

4. Fabricating, or causing to be fabricated, evidence, real or written, tending to the exculpation of the supposed delinquent. N.B. This is

ference to the ends of justice. In this sense, it seems applicable with equal propriety to the situation of any person whose duty it is considered to be, in virtue of any function (permanent or occasional), to render his services in any way conducive to these ends: to the situation consequently of *judge* (permanent judge), *juryman*, or *subordinate* minister of justice; or in the case of any officer considered in the light of a public officer, *prosecutor* as well as witness.

As to the means whereby a man may be caused to swerve from the line of his duty, whether by *eloigning* him (getting him out of the way) or otherwise, they seem comprisable under three heads, viz. *corruption*, *deception*, and *force*: including under the notice of *force*, as well psychological (*i. e.* fear of evil) as physical.

* For a list of these operations, see Scotch Reform, table I. col. iii.

one out of several modifications of forgery in relation to real or written evidence.

As to infirmative counter-probabilities, considered as applicable to the criminative circumstances comprehended in this class; the generally applicable ones already mentioned may perhaps be found, some of them, to be applicable upon occasion here, though in general with but a slight degree of probative (or rather disprobative) force.

The infirmative counter-probability peculiar to this class may be thus designated: *apprehension of similar mal-practice* on the other side.

The supposition that, in the character of an infirmative counter-probability opposed to any of the criminative circumstances in question, this consideration can operate with any such degree of disprobative force as to render it worth employing, involves the supposition of no ordinary degree of depravity on the part of the national character at the time.

English law affords a story, which, whether meant for truth or jest, may alike serve for exemplification. Pressed for payment on a forged bond, a man applies to his attorney. *Client*. "What is to be done?" *Attorney*. "Forge a release." On looking back, one cannot say exactly how far, it might not be impossible to find, even in English history, a period in which a story of this sort might have had a foundation in truth.

In some countries there have been said to exist a sort of houses of call, or register offices, for a sort of witnesses of all work, as in London for domestic servants and workmen in different lines, and in some parts of Italy for assassins.

Ireland, whether in jest or in earnest, was at one time noted for breeding a class of witnesses, known for trading ones by a symbol of their trade, straws sticking out of their shoes.

Under the Turkish government, it seems generally understood that the trade of testimony exists upon a footing at least as flourishing as that of any other branch of trade.

CHAPTER XII.

OF AVOIDANCE OF JUSTICIABILITY, CONSIDERED AS AFFORDING EVIDENCE OF DELINQUENCY.

ON the part of the supposed delinquent, the acts or modes of conduct immediately directed to the production of this effect may be thus enumerated :

1. *Expatriation* : migration into the dominion of some foreign state : viz. of some foreign state in which, at the instance of the judicatory in question, justiciability on the part of the supposed delinquent will not (it is supposed) in the case in question be enforced.

2. *Exprovinciation* : migration into another juridical district within the dominion of the same state ; viz. in so far as such change of place is regarded as being, definitively, or for a time, productive of the like effect.*

* Considered as a means of avoiding justiciability, the effect of exprovinciation will be the greater, the greater the obstruction offered by it to the power of justice, whether by means of local distance, or by means of independency of jurisdiction.

Of the mode and degree of the obstruction thus capable of being opposed, the diversifications are infinite : particularly in modern times, since it has been a fashion among the powers of Europe to comprise each of them within its grasp the most distant parts of the globe.

3. *Latency*: the supposed delinquent being so circumstanced as that means whereby he

The obstruction opposed by independency of jurisdiction, being a psychological cause, is removable: the obstruction opposed by local distance, a physical cause, is inexorable.

Accordingly, though in general the obstruction opposed by *expatriation* will be greater than by *exprovinciation*, yet, in some instances, that which is opposed by *exprovinciation* will be the greater. In the instance of some offences, (forgery in particular, in which public credit all over the globe beholds an enemy), the great European states, Britain not excepted, have surrendered each to the justice of the other its supposed delinquents. In so far as this disposition prevails, the obstruction given to the course of justice by expatriation, for example, from London to Calais, or even to Paris, may not be so great as that opposed by exprovinciation from London to the Orkneys, or though it were no further than to Edinburgh; not to speak of the West or East Indies.

Person and *property* are not the only objects on which, for the purpose of securing effective justiciability, the law has it in its power to take hold. Over and above these corporeal objects, there remain two incorporeal ones, viz. *reputation* and *condition in life*, by means of which the feelings of individuals are exposed to be wrought upon by the force of the law, as well as by that of lawless injury.

But *person* and *property* are the only objects which it is ever in the power of an individual, in case of delinquency on his part, to withdraw out of the power of the law: in spite of his utmost efforts, reputation and condition in life continue subject to it.

Even in regard to property, the extent of the power which it depends on the individual to exercise over it, in spite of the law, or without its assistance, is subject to very extensive limitations. To immoveables it does not extend: nor even to money or moveables in any case where, his power depending upon the consent of other persons, that consent is withholden or refused. Hence the influence, in some cases irresistible, in others no more than ideal, of the judgment of *outlawry*; by which, amongst other penal consequences, the defendant stands deprived in a considerable degree of that security for his property, which depends upon the protection that would be otherwise afforded him by the law.

may be found, as well as the spot where he is, are unknown; viz. to him who, in the character of judge, or in that of prosecutor, is desirous of causing his person to be forthcoming, for the purpose of his being justiciable.

4. *Latitancy*: *i. e.* where the non-forthcomingness of the supposed delinquent is clearly understood to have the avoidance of justiciability for its cause.

5. *Eloignement of property*: *i. e.* by expatriation, exprovinciation, transfer into other hands, or concealment.

6. *Tampering* with any person, on whom, in whatever character, *ex. gr.* in that of minister of justice, permanent or occasional, superordinate or subordinate (prosecutor, in the case of an offence considered as being of a public nature, included), his justiciability may depend.*

* Note here, that if, instead of any of the specific modes of designation here employed, the general expression (*avoidance of justiciability*) taken to serve as a title to this chapter, be employed, the inference in question is considered as already established.

In the case of each of these criminative circumstances, fear (viz. fear of the power of the law) is the relatively principal fact immediately indicated. Were they respectively present to the senses of the judge,—as are, in case of oral interrogation, the physical modifications of passive deportment which constitute the pathological evidence of that emotion, and the modifications of self-disserving testimony extractible by interrogation,—they would occupy the same station in the chain of suppositions. But, scarcely being in any instance so present, they cannot come to his cognizance but through the lips or pen of some deposing witness: by which means a fifth link is added to the evidentiary chain, as in case of any other inculpativ fact considered as having been extra-judicially observed.

In this case, *fear*, and *avoidance of justiciability*, may,

The several special inculpative circumstances comprised under this more general head being all of them indicative of fear,—fear having its source and object in the power of the law; the infirmative counter-probabilities applying to this case are *pro tanto* the same as those which apply to that.

In the case of the four that consist in so many expedients employed or supposed for the avoidance of personal forthcomingness, the infirmative consideration already above designated by the phrase *contemplation of juridical vexation notwithstanding innocence*, operates with peculiar force.

A circumstance that demands attention, with an immediate view to practice, is, that this force will of course undergo variation, according to the nature of the system of procedure; according to the mode and the degree in which it is subservient or adverse to the several ends of justice.

The exculpative force of this infirmative counter-probability will be the greater,—in other words, the probative force of the criminative circumstance constituted by *avoidance of justiciability by eloignement or concealment of person* will be the less,—the greater (for example) the

though not synonymous, be employed indiscriminately to represent the link in question in the chain of suppositions. It is only in so far as it is indicative of fear (fear of evil as about to be suffered from the hand of law), that avoidance of justiciability can operate as a criminative circumstance: and, to weaken the inference thus drawn, no other infirmatives seem applicable than what have been already brought to view as serving to weaken the probative force of fear itself, considered in the light of a criminative circumstance.

vexatiousness or the length of the imprisonment to which, by accusation or suspicion of the offence in question, a man stands exposed: understand provisional imprisonment (in technical language imprisonment on mesne process), so circumstanced that the innocent as well as the guilty stand exposed to it.*

* Under the penal procedure of the Roman law, or, to speak more accurately, of the system which, before the Revolution, existed in France, the probative force of the inculpativè circumstances of this class should accordingly, it should seem, be less than under the English.

For the purpose of computing the average duration of a penal suit, the collection of trials entitled *Causes Célèbres* (thirty volumes in closely-printed 12mo.) was examined. It was not in every instance that the duration of the suit could be ascertained: in the instance of those in which it was capable of being ascertained, the average duration turned out to be near six years. In these, it is true, the intricacy of the cause was above the ordinary pitch. But under English procedure it would be difficult, perhaps impossible, to find a penal cause, on the occasion of which, down to definitive judgment, the provisional imprisonment had lasted a fourth part of that time.

In penal cases, the procedure of the Roman school does not admit of discharge on bail with near so much facility as the English.

In England, in a case notailable, the criminative force of the circumstance in question may be calculated, and with some degree of precision, from geographical data. In the class of causes most highly penal, in London and Middlesex, justice is administered in about forty-eight days out of the three hundred and sixty-five; in the other counties, with the exception of the four northern ones, in about four out of the three hundred and sixty-five; and in these northern ones, in about two out of the three hundred and sixty-five.

A supposed duellist, for example, who has killed his man, is in a state of expatriation, latency, or even latitancy. In London and Middlesex, the criminative force of any one of these symptoms of fear (the possible chance of being let out upon bail by the Court of King's Bench, being laid out of the

Other differences might be cited, by which the determination, whether to abide or not to abide the course of penal procedure, could not but be more or less affected: the severity of punishment, and the severity of the process employed for the extraction of evidence. In France, while breaking on the wheel and other excruciating modes of capital punishment were in use, the hazard attending such abidance could not but present itself as considerably greater, and consequently the inference from flight to delinquency considerably less cogent, than at present, when simple death is the highest degree in the scale: and another, and, perhaps, still greater, difference, could not but be attached to the useless barbarity of preparatory torture.*

Health,—business,—pleasure;—by any one of these objects of pursuit may a man be engaged in a plan of expatriation, exprovinciation, or eloignement of property: by pursuit of pleasure, possibly even by pursuit of business, he may be engaged in a plan of latency: here there are so many infirmative counter-probabilities open (as not capable of being brought into calculation) will be a little less than four times as great as in any other of the southern counties, a little less than eight times as great as in any one of those four northern counties.

* How acutely sensible must a celebrated French lawyer have been to the defects of the system of procedure established in his country, when he said—“*Je fuirais, si l'on m'accusait d'avoir volé les cloches de Notre Dame!*” In such a state of things, it is evident, the infirmative force of the counter-probability which we have termed *contemplation of judicial vexation notwithstanding innocence*, is so strong as entirely to destroy the probative force of the circumstance of latitancy, considered as evidentiary of delinquency.

rating in diminution of the probative force of the four circumstances in question, in the character of evidences of fear of the hand of law, and thence as evidences of delinquency.

In a word, under one or other of these three modifications the ordinary pursuits of mankind in general being comprehended, the consequence in regard to the circumstances in question is, that, considered in themselves, and independently of every other circumstance of a criminative tendency, they can scarcely be considered, even putting all of them together, as operating with any perceptible degree of criminative force.

The presumption afforded of delinquency by any one of these changes will be the stronger, the greater the deviation it makes from the course of life habitually pursued by the supposed delinquent.

In the case of a mariner, a carrier, an itinerant vender, or an itinerant handicraft, it may amount to nothing: in other words, the disprobative force of the infirmative counter-probability denoted by the expression *pursuit of business*, may be so great as to reduce to nothing the probative force of the criminative circumstance or circumstances in question, viz. expatriation, exprovinciation, eloignement of property, or latency,—any one or more of them.

In case of real delinquency, — expatriation, exprovinciation, or eloignement of property, one or more of them, are apt to be accompanied with the circumstance of clandestinity; and (for the purpose of clandestinity) with mendacious extra-judicial discourse, having for its object

the preventing or removing, on the part of any persons on whose part inculpatory testimony is apprehended, all suspicion of the true cause.

That, by the concurrence of any such other criminative circumstances, the criminative force of the circumstances here in question cannot but receive considerable increase, is altogether obvious.

But it does not follow that, by the mere non-appearance of these confirmative circumstances, the criminative force of the circumstances here in question must be altogether destroyed; since it may happen, that,—the change of place in question having been already determined upon, in pursuit of business, health, or pleasure,—advantage may have been taken of the means thus afforded for the avoidance of justiciability, and, under favour of the promise of impunity thus entertained, the crime in question may have been committed.

As to *tampering* with prosecutors and other ministers of justice; to an act of this description, considered in the light of a criminative circumstance, the same suppositions apply in the character of infirmative counter-probabilities, as have been seen applying in the case where the persons thus practised upon are considered in the character of witnesses.

Expatriation, exprovinciation, and eloignement of property, involve in each instance the necessary supposition of intentional agency, positive or negative, but in general positive, on the part of the supposed delinquent himself. In latency, on the other hand, no such supposition is necessarily involved: what it designates is the

effect; not any act by or by the help of which the effect is produced.

Latency,—though it does not necessarily import, on the part of the supposed delinquent, any act done by him in the view of producing the effects designated by it,—is, in respect of its criminative force, subject to the operation of the same counter-probabilities as those which apply to the other criminative circumstances which do, on his part, import action: since, like any of them, it may be the result of a man's ordinary and blameless pursuits.

By the word *latency*, nothing more can be designated than the state of him in whose instance no means of communicating with him, either through the medium of his place of abode or otherwise, is known to those to whom such knowledge is necessary to enable them to insure his forthcomingness for the purpose of justiciability.

But in whose conduct is the cause of this want of knowledge to be found?

Till this point be settled, the condition denoted by the word *latency* can scarcely, with propriety, be placed upon the list of criminative circumstances.

The means of communicating with an individual, (*i. e.* the means the best adapted to that purpose), can scarcely be brought under any general description: they will in every case be dependent on the individual circumstances in which, at the individual point of time, he happens to be placed. But it does not often happen that the means are deficient, or prove ineffectual, when, to the real desire, the power is

added,—such power as it depends on the law to give.*

If it be really my wish to communicate with a man, to hear from him, and make him hear from me, what course do I take? The answer is almost too obvious to be called for: I make inquiry among his friends. Such is the course which every body takes whose wish it is to succeed; and such is the course which it has been the care of English judges not to take.

Supposing powers adequate to the purpose given by the law, those powers accompanied with the correspondent obligations, and those obligations duly fulfilled; then it is, and not till then, that latency becomes presumptive evidence of *latitancy*, and through that of criminality: *latitancy* being understood to designate *voluntary latency*, having for its object the avoiding forthcomingness, for the purpose of avoiding justiciability.

Supposing the fact of latency established,

* Unfortunately, under English law, no such suppositions are realised; a system of sham notices being among the devices whereby the ends of judicature are pursued, under the pretence of pursuing the ends of justice. On this as on so many other occasions, the inquiries which common sense would dictate, and common honesty pursue, legal policy forbids. Without any expense of thought, from latency *latitancy* is inferred, and from *latitancy* delinquency; and, though not absolutely without other evidence, yet without any evidence of the nature of which it is possible for the supposed delinquent to be apprised. If a bill of indictment, after evidence heard thereon, is found true by a grand jury sworn to secrecy, a writ called a *capias* issues thereupon; and, in consequence of that writ, after a series of sham notices read by a man to himself in a private chamber, judgment of outlawry, in which conviction is included, is pronounced of course.

and the fact of latitancy justly inferred from it; still, under the existing institutions, there exists a counter-probability by which its probative force in the character of a criminative circumstance is weakened. Fear, and fear of the law, would indeed be indicated; but the real evil apprehended at the hands of law might be, not the evil of punishment, inflicted under that name, on the score of criminality in any shape, but the evil of imprisonment, on the score of satisfaction for money due on an account not penal.

In so far as non-discharge of pecuniary debts, or other non-penal obligations, is considered as an offence, and non-surrender of a man's person to imprisonment in satisfaction for the wrong done by the non-fulfilment of those obligations, is considered as an ulterior offence grounded on the former;—the engaging in a course of latitancy for the purpose of avoiding such imprisonment, may be considered as constituting the matter of the infirmative supposition above indicated under the title of *design less culpable*.

Suppose a prosecution actually commenced, and notice of its being so actually received by the supposed delinquent: on this supposition latency is actually converted into latitancy.

Notoriety of the obnoxious event, coupled with notoriety of popular suspicion fixing upon the supposed delinquent as having been concerned in the production of it;—these circumstances together will operate, of course, in the character of evidentiary facts, affording presumptive evidence of the information's having reached his ears.

By habitual occupation, or by accident, he was in an itinerant state. He is illiterate, and the advertisements, if any have issued from the press, have not reached his eyes. The country is of the number of those which are not yet far enough advanced in the arts of life to render communications in that mode customary or easy. These may serve as examples of a variety of circumstances, by which the probative force of simple latency, as evidentiary of latitancy, may be more or less impaired.

CHAPTER XIII.

OF THE SITUATION OF THE SUPPOSED DELIN-
QUENT IN RESPECT OF MOTIVES, MEANS,
DISPOSITION, CHARACTER, AND STATION IN
LIFE, CONSIDERED AS AFFORDING EVI-
DENCE OF DELINQUENCY.

SECT. I. — *Of the situation of the supposed delinquent in respect of motives and means, considered as probabilizing or disprobabilizing delinquency.*

BETWEEN these several objects the connexion is so intimate, that they can scarcely be spoken of, any of them, without reference to the rest. But, with regard to delinquency, the indications they will be seen to afford, are, with reference to one another (though all material) very various, and even discordant; being not uniformly inculpative, but in some respects exculpative,—in others directly inculpative,—in others again inculpative, but not so much directly as indirectly, by serving to weaken the force of an exculpative circumstance: and, as such, not admitting any infirmative supposition.

The psychological object designated by the word *motive*, is, as it were, the basis of all the rest.

The existence of a motive, by which the supposed delinquent might have been led (it is supposed) to the commission of the offence in question, is a fact which, in criminal cases more especially, is very frequently made the subject of proof. Is there any use in doing so? In certain cases, no: and in those, I believe, it never is done: in other cases, yes: and in these, I believe, at the suggestion of common sense, it commonly is done. In what cases, and in what sense of the word *motive*, it is worth while and practicable to have recourse to evidence or argument for this purpose, seems very generally understood in practice.

Motive is a term applied to the indiscriminate designation of divers objects, which require to be distinguished.

It is applied to designate any *desire*, when considered as the cause of action: call this the interior or *internal* motive.

It is applied to designate any corporeal thing, or mass of things, considered as the object of any such desire: call the object by which such desire is considered as excited, or capable of being excited, the exterior or *external* motive.

Thus, when a hungry man knocks down a baker, for the purpose of stealing a loaf of bread, hunger is the *internal* motive of this criminal act, a loaf of bread the *external*.

A mischievous event being supposed to have been produced, and Titius suspected of having been concerned in the production of it, *What could have been his motive?* says a question, the pertinency of which will never be matter of dispute.

The following seem to be the circumstances to which it owes its pertinence.

Every act, which, in the force of any one or more of the tutelary sanctions, finds a source of restraint,—every penal, every disreputable, in a religious community every irreligious, act,—is on that account rendered more or less improbable, by the consideration of the penal or other evil consequences attached to it. Unless this restrictive force finds an impulsive force, and that stronger than itself, in opposition to it, the culpable act is not merely *improbable*, but, psychologically speaking, * *impossible*.

To ask, *What*, in this case, *could have been the motive?* is to ask, not what could have been the interior, but what could have been the exterior motive, and that adequate in point of force to the production of such an effect. Not the interior motive; because, without any exception worth noting to the present purpose, all sorts of desires are common to all human beings: but what could have been the *exterior* motive? In the situation in which the supposed delinquent appears to have been placed, where is the object to be found, which could excite a desire strong enough to give birth (notwithstanding the opposition made by the combined force of the several tutelary sanctions) to an offence of the nature of that which he is suspected of?

To go about to prove on the part of the supposed delinquent the existence of a *desire*, a *feeling*, a *passion*, which presents itself as capable of accounting for the commission of the

† See below, the chapter (chap. xvi.) on Improbability and Impossibility.

crime, would be an enterprise frequently impracticable, and always useless. No crime that has not some species of desire for its cause; and, with an exception or two not worth dwelling upon, no human bosom that is not the seat, constantly or occasionally, of every modification of desire.

It is not the mere existence of the desire,—the propensity or the relish for this or that source of pleasure, the aversion for this or that source of pain. If it were,—by the same rule that the supposed delinquent is guilty, so is every other human creature. It is the existence of some exterior object, of a nature to call into action this or that desire or propensity, and to infuse into it a degree of force capable of surmounting the joint force of those tutelary motives, by the influence of which men in general are restrained from giving the reins to criminal desire.

Under the denomination of the *motive* must be comprised, for the present purpose, not only the internal desire, but the contemplation of the exterior event, or state of things, which the desire looks to for its gratification;—looks to as the cause which will bring within a man's reach the good (whatever it be) which is the object of the desire. The existence of the motive in the former sense, is the psychological fact; in the latter, the physical fact. It is in the latter sense, and that alone, that the existence of a motive either requires proof or is susceptible of it. In this case, the internal motive to the act—the criminal act—is the expectation that the good in question will be brought into a man's possession by such criminal act. The existence of Titius is sufficient proof of Titius's being acted

upon, and that during the whole course of his life, by the love, the desire, of the matter of wealth. The man who, desiring to live, has no desire for the matter of wealth, exists only in the fancy, or rather in the language, of shallow declaimers: to desire to live is to desire to eat; and to desire to eat is to desire to possess things eatable.

What, then, is the matter of fact proved, under the name of the existence of a motive? It is either the actual excitation of this or that desire by this or that assignable cause; or else the existence of this or that object, in a state in which it will naturally, in the breast of the party in question, have had the effect of exciting this or that desire. Man in general is susceptible of enmity: the desire of witnessing pain on the part of the individual who is the object of it. Man in general is susceptible of sexual desire. No human bosom that does not harbour within itself the love, the desire, of the matter of wealth. Thus much is what every body is sufficiently persuaded of: thus much is what nobody ever thinks of proving. But Clodius had become the object of enmity to Milo: in the bosom of Tarquinius the appetite of sexual desire had attached itself upon the idea of Lucretia with particular force: upon the death of Amerinus, property to a considerable amount was secured to Hæres; of that state of things Hæres could not be unconscious, and had been heard to speak of it with impatience. These are facts which admit of proof, and may well appear to call for it. But, in the case of the happening of the correspondent obnoxious event in question, and a suspicion pointing to Milo,

Tarquinius, or Hæres, respectively, as the criminal author of that event; to prove the existence of these respective facts, is to prove, on the part of these persons respectively, the existence of the appropriate motive.

Thus it is that the consideration of any object pointed to as capable of having operated, in the case in question, with an adequate degree of seductive force, acts in relation to the supposed offence, not so much in the character of a directly probabilizing consideration, as in that of a consideration tending to repel the force of improbability (psychological improbability) acting in the character and direction of a disprobabilizing circumstance. On no occasion (says the defendant) does man ever act without a motive. Admitted (replies the prosecutor): but here, then, was your motive: such or such may have been the desire excited in your breast: thus or thus was it, or might it have been, gratified by the event, of which, from all the evidence taken together, your act, your criminal act, is concluded to have been the cause. Against this disprobabilizing circumstance — psychological improbability, — the existence of a motive, if proved, may have considerable weight: it may even destroy the force of the disprobabilizing circumstance altogether. Considered in itself, the criminative force of the circumstance consisting in the *motive* (consisting in this, viz. that the situation in which the supposed delinquent is, is such as subjects him to the action of the motive in question), amounts to nothing. In the natural course of things, where there is any property, every child has something to gain by

the death of a parent. But, upon the death of a father, no one is ever led by any such consideration to look to an act of parricide, in the first instance, as the most probable cause of the death.

Not being properly a criminative circumstance, no counter-probabilities seem applicable to it in the character of infirmative considerations.

The following cases may serve as instances where, in the way above explained, the *motive* (viz. the *exterior* motive) became, and with propriety, an object of consideration, in the character of a criminative circumstance.

Anno 1781. — Donnellan's case at Warwick assizes. Offence, murder of his wife's brother. Motive, prospect of succession to his property.

Anno 1803. — Fern's case at Surrey assizes. Offence, incendiarism. Motive, profit by over-insurance.

Anno 1803. — Robert Wilson's case at Edinburgh. Offence, murder of his wife. Motive, paving the way to a more agreeable connexion with another woman.

Anno 1753.—Mary Blandy's case at the Oxford assizes. Offence, the murder of her father by a long course of poison. The property of the father was considerable: she was an only child: it would fall to her of course. But, where parricide is the offence, is it in the nature of money to constitute a seducing motive? At that rate, parricide, instead of being as rare as it is horrible, would be among the most frequent of offences. She was enamoured of the wretched Cranston, her seducer, and the

existence of the fondest of parents presented itself as an obstacle to an union, which, had she known all, she would have known could not be legalised. What the force of steam is in the physical world, the force of love is in the psychological: capable, when under pressure, of opposing the strongest force. The existence of such pressure is among the most common of all family incidents; the attempt to surmount it by such flagitious means, happily among the most rare. But to bring this motive to view required no separate evidence. The same evidence which shewed from what source she had received the poison, shewed by what motive she had been led to administer it.

Theophrastus is accused of theft. Fortune, opulent; reputation, unspotted; disposition, generous. The object of small value. Delinquency assumed; what could have been his motive? It was a black-letter book; a cockle-shell; a butterfly. Theophrastus was a collector.

Means, i. e. means of producing the mischievous effect in question, seem to come under consideration to much the same purpose as *motives*. The belief of the existence of whatever means are regarded as necessary to the production of the effect in question, being a condition precedent to the endeavour; *means* may in this case be considered as coming under the denomination of *motives*: power being as necessary an article as desire, in the assemblage of productive causes.

By *opportunity* seems to be understood an assemblage of such articles, in the composition of the aggregate mass of means, as possess not a permanent, but only a transient existence.

SECT. II.—*Of the situation of the supposed delinquent in respect of disposition and character, considered as probabilizing or disprobabilizing delinquency.*

DISPOSITION is produced by motives.

A man is said to be of such or such a disposition, according as it is to the influence of the motives that belong to this or that class that he is considered as being more or less in subjection : reference being made to the degree of influence supposed to be exercised by these same motives over the minds of the generality of the class of persons with whose conduct his conduct is compared. If the motives of the self-regarding class are considered as predominant, a selfish disposition is ascribed to him. If motives of the social class, a disposition of the social or benevolent cast : if of the dissocial kind, a disposition of the dissocial or malevolent cast.*

The effect of *disposition*, supposing it in proof, may be either inculpative or exculpative. So far as it is of the virtuous cast, and thence the tendency of its operation exculpative, important as the consideration is, it belongs not to this place. The effect and use of it is, to be opposed to inculpative evidence of all sorts, and, on the ground of a modification of improbability (viz. psychological improbability), to tend to discredit direct and positive evidence ; or, in the charac-

* See Introd. to Mor. and Legis. Where a multitude of acts of the same complexion are considered as following one another on the part of the same person, (especially if in a series extending over a considerable length of time), the word *habit* is applied to the case. From a single act, disposition is apt in some cases to be inferred : *à fortiori*, from habit.

ter of an infirmative consideration, to diminish the probative force of the inferences drawn from the circumstantial part of the evidence.

So far as the disposition indicated is of the vicious cast, exhibiting a more than ordinary degree of force on the part either of the self-regarding or dissocial motives; it will generally, though not uniformly, afford inferences tending to probabilize the delinquency of the supposed delinquent, in respect of the offence in question, whatever it may be. In general, however, it admits not of proof on purpose. To take *disposition* for the subject of express inquiry, would be to try one cause, or perhaps a swarm of causes, under the name and on the occasion of another.

But, not unfrequently, indications of disposition, depravity of disposition, come in of course, along with other and more directly apposite evidence; and when it does, it is naturally impressive; and, if sufficiently proved, it is scarcely to be wished that it should be otherwise than impressive.

As to infirmative suppositions, they are, here also, plainly out of the question: reasons the same as above.

Character is sometimes used as synonymous to *disposition* itself; but, more commonly, for the opinion supposed to be entertained concerning the disposition of the individual in question, by such persons as have had more or less opportunity of becoming acquainted with the indications given of it.*

* Thus in English. In French, *caractère* seems scarcely ever to be employed to denote any thing but the disposition

Character is accordingly, on occasions of this sort, the word almost exclusively in use: *disposition* very seldom: the distinction is scarcely an object of notice.

For the consideration of character (so far as there is any difference) there is evidently still less room, in general, than for that of *disposition*, for the purpose of probabilizing the act of delinquency in question, on the part of the supposed delinquent.

Cases, however, are not altogether wanting, in which not only the question of *disposition*, as indicated by this or that article in the general mass of evidence collected for other purposes, but even the question of *character*, as distinguished from disposition, may, in a criminative view, present a claim to notice.

Offences having ill-will for their motive — having ill-will for their psychological cause, — seem to be those, in respect of which, in a criminative view, the question of character is most apt to be material. In the case of an offence of this description, take the following examples:

1. Offence, personal injury; the author uncertain: the character of the supposed delinquent, is it such as to point to him rather than to others?

2. Quarrel mutual; the supposed delinquent a party: the transaction more or less involved in obscurity: — considering the adverse party on the one hand, and the supposed delinquent on the other, — which, in respect of his *character*, seems most likely to have been in the wrong, or likely to have been most in the wrong?

itself: where the opinion entertained of it by others is meant to be brought to view, the word *réputation* is employed.

SECT. III. — *Difficulties attendant on the admission of character evidence.*

IN an abstract point of view, it appears obvious and indisputable, that, on the question between delinquency and non-delinquency, considerable light may be expected to be thrown by the consideration of previous character. But, when the occasion calls for applying this general notion to practice, difficulties of no small moment will be seen to arise: some of them such as seem scarce capable of receiving solution, but in the Gordian stile.

1. Character favourable: tendency of the evidence, exculpativè: fact indicated, non-delinquency. Bond of connexion between the evidentiary fact and the fact indicated, improbability of the psychological kind: improbability that a man bearing such a character should have soiled it by such an offence: that a man in whose instance the preponderance of the social motives over the dissocial and self-regarding has been so decided and confirmed, should, in the individual instance in question, have given way to the impulse of the seductive motives.

Whether the character be general or special, in this case the danger of prejudice to justice does not present itself as by any means considerable enough to indicate the propriety of excluding the evidence in any case. 1. Circumstantial evidence so loosely connected with the fact in dispute, is not likely to prevail against a mass of appropriate evidence, whether direct or circumstantial or both together, to an amount sufficient for conviction. 2. In the case of general bad disposition, and its natural conse-

quence, bad character, it will in general not be easy to obtain testimonials of good character from persons possessing a character of sufficient apparent trustworthiness to present a prospect of material probative force.

Nor would it be safe to put an exclusion upon evidence of this nature : inasmuch as, in case of an inculpative conspiracy, or even an untoward combination of circumstances, it may be the only sort of evidence by which it may be in the power of the purest and most exalted probity to defend itself. In all such cases, general character, it being on the favourable side, is pertinent : nor does it lie open to the objection which we shall see applying to it if employed for the purpose of painting character on the unfavourable side.

What seems the only objection, then, in this case, is referable to the head of vexation : vexation to the judge, (which is vexation to the public through the medium of the judge), by the time that may come to have been consumed in the exhibition of a species of evidence of which the probative force is so inconsiderable and inconclusive : vexation again to the judge, by the quantity of his power of attention that may come to have been expended upon a species of evidence comparatively irrelevant : a species of vexation which, when screwed up to a certain height, becomes dangerous even to the direct justice of the cause.

To the species of vexation attaching itself (as above) to the station of the judge, may be to be added in some cases another lot of vexation attaching itself to the station of witness ; viz. to the witnesses from whom the testimony in

question is to be extracted. On the other hand, vexation, in this instance, supposes unwillingness on the part of the witness, power to compel his testimony notwithstanding, and that power exercised. A witness who is on such an occasion unwilling to depose in a man's favour, is not likely (it may be said) to be called upon by him for that purpose: hostility rather than sympathy is the affection in such a case to be expected. But it does not follow by any means, that because a man is unwilling to take upon him the loss of time, and perhaps expense, imposed upon him by his coming forward in the capacity of a witness, his reluctance and resentment should rise to such a height as to engage him to give an unfavourable testimony, in contradiction to his own conscience.

2. The case where the party calling for the evidence of character (the defendant's character) is the demandant, the prosecutor,—the expected tendency of it consequently unfavourable,—presents much greater difficulties.

1. Is it conceived in general terms? no specification of facts, no instances of particular misconduct on any individual occasion specified?—a wide, and at the same time a safe, door is opened to calumny. The calumny is in its nature unpunishable. By the supposition, no particular fact is or can be specified; nothing which, for the purpose either of punishment or compensation, is capable of being disproved. What is delivered is mere matter of opinion; and that an opinion which, by the power of the law itself, a man is compelled to give.

2. Is it conceived in particular terms? particular facts stated?—Still either the door is left

open to calumny, or fresh difficulties present themselves. Neither on this nor on any other occasion ought a man's reputation to be liable to be destroyed or impaired by mere hearsay evidence. If a punishable or otherwise disreputable act is to be charged upon a man, on this occasion as on others, the charge ought to be made good by a satisfactory mass of evidence. On this as on any other occasion, he ought to be heard in his defence, with liberty to contest the charge, and produce exculpatory evidence of all sorts, as in other cases. Under the name of giving evidence of character, what then does the operation here in question amount to? It is trying one cause for the purpose of another cause. Say rather, trying an indefinite number of causes: for it is not a single swallow that makes a summer, a single act a habit, a disposition, a sufficient ground for character, and that unfavourable. Causes thus in any number are tried—one cause, at least, is tried,—as it were in the belly of another.

Considered in itself, the trial of any or every such incidental cause cannot, with any consistency, be regarded in the light of an inconvenience. Either the law is a bad one, and as such ought to be repealed, or obedience to it ought to be enforced. Either the law itself is a grievance, or the non-execution of it (bating the particular cases calling for pardon) is a grievance. Far from regret, it should be matter of satisfaction, that, by so cheap and unexceptionable a method, delinquency is brought to light.

But it is by the decision given in these incidental causes, that the decision to be given in

the principal cause is to be influenced. On this supposition, perhaps the progress, at any rate the conclusion, of the principal cause, is kept back till after the conclusion of each such incidental cause.

Such are the difficulties, in the case where the imputation clothes itself in specific forms. Where, as above, it confines itself to generals, the difficulty, the ulterior difficulty, that remains to be brought to view, is different, but not less. Those persons on whose opinion or pretended opinion, without any check upon their mendacity, the fate of the defendant is more or less to depend, who are they? What sort of a character is theirs? *Character* in this case, the case of a witness, a mere witness, presents (it must be allowed) or at least ought to present a different idea in this instance from what it did in the other, in that of the defendant. In the instance of the defendant,—the character, the disposition in question (it is, by the supposition, of the unfavourable cast), admits of any modification, according to the nature of the imputed offence: in the case of the witness, it is confined to mendacity; or, if it extend to any other vicious propensity, it is only in so far as a propensity to mendacity may be inferred from it.

But if the character of any one witness ought to be suffered to be put in issue, so, by the same reason, ought that of every other. This being admitted, you put it in the power of the party—of that one of the parties whose interest it is to defeat law and justice—to bring upon the carpet a chain of character evidence without

end ; an arithmetical repetend, or, by accident, even an arithmetical circulate.

SECT. IV. — *Rules tending to the solution of the above difficulties.*

IN judicature, in legislation, difficulties (how great soever) should never be dissembled. From falsehood, from concealment, from imposture in any shape, justice never profits, never can fail of suffering, upon the whole.

The complete removal of the eventual inconveniences and correspondent difficulties being hopeless, all that remains is to present such considerations and expedients as appear calculated to reduce the embarrassment to its minimum.

On the one hand, to compel the admission of this sort of evidence in all cases, on both sides, and of both aspects, favourable and unfavourable,—on the other hand, to compel the refusal of it in any case by an unbending rule,—are two extremes, both of which, though not in equal degree, threaten to be prejudicial to the interests of justice. It seems to be one of those cases in which a considerable latitude ought to be given to the discretion of the judge. To abuse it, will not, indeed, be out of his power ; but neither is the danger of abuse so great, but that, if he is not fit to be trusted with this power, neither is he fit to be trusted with the other powers attached to his office.

If there were a case in which it would be proper to render the admission of evidence of this species compulsory, it would be the case

where, the character in question being that of the defendant, the evidence is called for at his instance, and the punishment attached to the offence is loss of life. Why?—Because, in case of an improper refusal, punishment undue, and at the same time irreparable, may be the consequence. But what is the measure indicated by this consideration?—Not the making the admission of this species compulsory, even in this case, but the forbearing to employ a mode of punishment, which in this as well as every other point of view is adverse to the interests of justice, favourable to them in none.

The case in which the sort of circumstantial evidence afforded by moral character is of greatest importance, is that in which, the station of the party and the witness being combined in one, the cause affords no other evidence on that side.

The demand for this species of evidence is of course doubled, in the case where the same combination of stations takes place on both sides, and on each side is accompanied with the same absence of all other and less suspicious evidence.

In cases not penal, it will constitute a natural safeguard against perjury on the part of a plaintiff deposing in support of his own demand; supposing an habitual course of perjury to be capable of being otherwise engaged in as a source of livelihood. The taint which a few steps in this career would have the effect of imprinting on a man's reputation, would not fail to oppose a powerful obstacle to his persevering in it with any adequate prospect of success.

The following seem to be the considerations

by which the admission or rejection of this species of evidence ought to be determined :—

1. The importance of the cause to the demandant's side, in respect of the mischief of impunity.

2. The importance of the cause to the defendant's side, in respect of the mischief of undue punishment.

3. The importance of the matter in dispute to each party respectively, in the case of a non-penal cause.

4. The delay threatened by the production of the evidence applied for.

5. The vexation apprehended to third persons, from the production (supposing it compulsory) of the evidence applied for.

6. The doubtfulness of the case, as it stands on the ground of the other more appropriate evidence.

The following rules and observations seem calculated to aid the judge in determining on the admission or rejection of this species of evidence :—

1. No evidence of character, good or bad,—no speaking to character, favourably or unfavourably, (*i. e.* at the instance either of the defendant or the demandant),—ought to be admitted, without power to the judge (if he thinks fit) to allow of time for inquiry into the character of the character-givers themselves. Why?—For the same reason as in case of *alibi* evidence.* But the force of the reasons in this case are much less conclusive, the evidence of badness of character being in its nature so much less precise and satisfactory than the evi-

* See farther on, chap. 16, sect 2.

dence of the existence or non-existence of such or such a person, at such or such a time, in such or such a place.

2. Evidence of bad character in crimination of the defendant, ought not to be admitted, unless in so far as it results from evidence admissible on other grounds; or unless, the fact of the offence being clear, the question is, between two persons suspected, which of them was the author? And even in these cases, (that the quantity of vexation and delay may not be altogether boundless), power should be left to the judge to limit the quantity or quality of the evidence, the number and choice of the witnesses, in declared consideration of the apprehended magnitude of these respective inconveniences.

3. If, at the instance of the defendant, evidence in favour of his character is admitted; so, at the instance of the other side, should counter-evidence operating in disfavour of his character be admitted, and time accordingly be allowed for it.

4. Supposing the extraction of self-criminative evidence from the mouth of the defendant admitted, examination to this point will be as unexceptionable as to any other; and, so far as it extends, the vexation will be kept from reaching third persons; and the additional delay will be less, in the case of evidence extracted from this source, than of evidence extracted from any other.

5. Two considerations operate in diminution of the inconvenience from character-evidence at the instance, and consequently in favour, of a defendant. If the characters of his witnesses are obscure and unknown, the danger of their

obtaining undue credence is but little ; if suspected, still less :—if known, so as to present a claim to confidence, the inference thence deduced, though not good as to past innocence in respect of the individual offence charged, may be good in respect of the probability of future reformation, in consequence of the impression made by the trial and its attendant terrors.

6. But if, in consideration rather of the prospect of reformation than of the probability of innocence, acquittal be grounded on evidence of preceding good character, as above ; it ought not to extend beyond the amount of punishment under the name of punishment : it ought not to preclude the party injured from satisfaction at the expense of the defendant, if the force of the evidence, upon the whole, would be sufficient to entitle him to a decision in his favour, supposing the case a purely non-penal case.

7. If the appropriate evidence in the cause leans in favour of the defendant, the demand for this inappropriate evidence has no place.

8. Supposing a professional judge or judges, with a jury of occasional judges ; power might be given to the judge to suspend the admission of this character-evidence, so as not to admit it but in case of conviction, or indecision, on the ground of the appropriate evidence. Suppose a professional judge or judges, acting without a jury ; the demand for the conditional decision, as above, has no place. He simply suspends his definitive decision till the evidence of character has been got in.

Character evidence has this in common with *alibi* evidence, that it is with the utmost facility and clearness distinguishable from every other

species of evidence. What passes in relation to it is therefore, with proportionable facility, susceptible of registration :

1. Whose character it is; the demandant's or the defendant's.

2. At whose instance called for; that of the demandant, the defendant, or the judge.

3. When called for by demandant or defendant, whether ordered accordingly, or refused, by the judge.

4. If refused, on what ground: whether delay, and to whose prejudice, that of demandant or defendant; or vexation, and to whom,—whether 1. to the court and the public, in respect of time consumed, or 2. to the witness or witnesses, or 3. to the party repugnant, in respect of the expense.

5. If exhibited, whether prevalent or inoperative; *i. e.* whether the decision was in favour of that side or of the opposite.

6. Length of time consumed by the evidence of this description: in court, by the exhibition of it; out of court, in waiting for it: ratio of this length of time to that of the length of time consumed in like manner upon the other evidence, the appropriate evidence in the cause.

7. Names, description, and number of the witnesses of whose testimony this evidence was composed: ratio of this number to that of the whole number of the witnesses whose testimony was exhibited in the course of the cause.

Such is the information by which the advantages and disadvantages attending the employment of this species of evidence would be placed in a distinct and satisfactory point of

view. In this place, the statement of the heads occupies space ; but, in each cause, the space as well as time consumed by the entry of the matters coming under these heads would be trifling indeed in comparison of the use.

Hitherto, the question regarding the admissibility of character-evidence has been considered only so far as regards the character of the defendant. But there still remains another question : — how far shall it be allowable to produce evidence for or against the character of a witness ?

In this case, an imputation conveyed in general terms may, on certain conditions, without any preponderant inconvenience, be admitted. What then are these conditions ?

1. In the first place, the imputation, if general, should be confined to that part of a man's character which respects veracity. The witness, among his acquaintance, is regarded as an habitual liar. A habit of this sort may be ascribed to a man without specific proof: why? — because a habit of this sort may be the result of a multitude of acts, none of them, perhaps, punishable in course of law, and too numerous to be proved.

2. But in this case it should be allowable for the party by whom the witness is produced, to call upon the impugning witness (viz. upon his cross-examination) to declare, if it be in his power, the particular instances in which this alleged disposition to mendacity became apparent.

3. In the next place, an imputation of this sort ought not to be admitted, unless it has been previously ascertained that there are three

witnesses, or two at least, to maintain it. The considerations that suggest this limitation are as follows:

Of evidence of this sort, if false, the falsity is not, in its nature, capable of being proved for the purpose of punishment. In case of that sort and degree of improbity on the part of the party in question, which prompts to subornation, this is of that sort of false evidence which is procurable with least risk, and therefore with least difficulty.

If an imputation of this sort has really attached upon a man's character, it can scarce happen but that more witnesses than one may be found to speak to it. There seems, therefore, little danger that the condition in question, if annexed, should operate in exclusion of this species of evidence.

The objection above mentioned as presenting itself on the ground of facility of subornation, will thus be proportionably reduced in force. It is not only twice as difficult,—indeed (as on close examination it would appear) more than twice as difficult,—to suborn two false witnesses as one; but, in case of their being procured, the chance of detecting the falsehood is much increased, in respect of the probability of disagreement and mutual treachery, as between individuals thus linked together by community in guilt.

Supposing the general habit of mendacity (viz. extra-judicial mendacity) ever so clearly established; the judge should not regard the inference from such general mendacity to mendacity in the individual case in question (viz. a judicial case), as being by any means conclu-

sive. On the ordinary occasions of life, a man has no such cogent motives to confine him to the path of truth, no such sanctions to bind him to it, as in this extraordinary one. Without a motive of some sort or other, a man will not encounter any risk: without a motive, and a motive of very considerable force, a man will not subject himself to such serious risks.

So far as specific acts are concerned, there are but two sorts of crimes that present themselves as affording any inferences worth regarding in this view. These are,

1. Crimes of mendacity. At the head of these stands actual perjury: underneath, at a considerable distance, stand other crimes of extra-judicial mendacity, such as obtaining valuable things or services by false assertions, which, though made in direct terms, are made without oath: below these again, crimes in which the assertion is indirect and inexplicit, as in case of forgery at large, and those forgeries which have coin or money of any kind for their subject-matter.

2. The other class is composed of such other offences of the predatory cast (such as theft, highway robbery, and housebreaking), as suppose what may be called a general prostration of character; though here, too, the inference from such an act will be very inconclusive, unless it appear connected with a habit of the same kind. But, in the case of all offences in the description of which mendacity is not involved, the inference will stand lower in the scale of strength by a very determinate and perceptible degree.

As to offences which neither are indicative of

any such prostration of character, nor involve any breach of the duty of veracity; in the case of any such offences, the inference may be said to fail altogether. Offences produced by the irascible passions, and offences produced by the sexual appetite, may serve for examples.

In the case of a witness, evidence of good character can scarcely ever be admissible with propriety in the first instance; for no imputation is cast upon a man's character in this case, as there is in that of the defendant; and, till a ground for a contrary opinion presents itself, the character of the witness, like that of every other man, ought to be presumed a good one. The endeavour to produce evidence of this sort would merely have the effect of producing useless delay, vexation, and expense.

But, in this same case of a witness, if evidence charging him with bad character has been produced on the adverse side, there seems no more reason for excluding evidence of good character in behalf of the same person, than has been seen already in the case of a defendant. On various scores, evidence of good character is liable to much less objection than evidence of bad character. When no evidence of bad character had been adduced, the demand for similar evidence of good character did not exist; but the demand now does exist, the case being reversed.

SECT. V.—*Of the station of the supposed delinquent, considered as probabilizing or disprobabilizing delinquency.*

STATION may be considered as indicative of

the disposition, and thence of the character, of the class : viz. of the class to which the individual in question belongs : of the class composed of the individuals by whom the station in question is occupied.

To an inculpative purpose, this circumstance can scarcely be considered as having any application. In every political community, the lowest station is that which is occupied by the greatest number of the members.

It is only in the character of an *exculpativ*e circumstance, viz. on the ground of improbability—psychological improbability, as above,—that this circumstance is apt to operate with any considerable degree of probative force : and, thus applied, the force (*i. e.* the disprobative force in respect of the probability of the offence in question on the part of the supposed delinquent in question) with which it operates, is apt to be very considerable.*

* The distinction between *general* and *special* is applicable to the circumstance of station, as well as to disposition and character. Laying out of the case the general distinction between high and low ; inferences of an inculpative nature seem to have been deduced from the consideration of this or that particular station or occupation by English law.

Thus, on the ground of supposed hard-heartedness, butchers have been considered as being (in capital cases at least) excluded from the capacity of serving as jurymen : and, judging on this principle,—supposing an act of homicide, or offence attended with bloodshed, committed, and, as between two men, the one a butcher, the other not, the question, *which was the man?* hanging in suspense,—the answer would, if consistent, be, the butcher. It seems questionable, however, whether, upon consulting the annals of criminality, this presumption would be found to have any ground in fact. Against soldiers and sailors it might be supported, perhaps, with a closer appearance of reason ; not to speak of surgeons : and even in these instances it seems questionable whether

The principal application of this species of evidence is that which obtains in a cause (especially a penal cause) where the matter in question is an article of property: more especially in cases where (as in ordinary thefts) the value of it is inconsiderable, in respect of the habitual pecuniary circumstances of the defendant, as indicated by the species of circumstantial evidence in question, viz. his station in life. A man in a station of life thus elevated, is it likely that his necessities should be so urgent as to drive him into a channel of supply at once so scanty and so hazardous?

Compared with moral character, the presumption afforded by this circumstance will, in general, be much more persuasive. Why?—Because the matter of fact will, in general, be so much the more notorious, so much the less liable to be misrepresented by the force of bias. The presumptive evidence of habitual opulence afforded by office, visible property, education, habitual expenditure, will, in general, be much more incontestable than any which can be afforded of moral character by general expressions.

(numbers being taken into the account) the presumption would receive any support from experience.

In a case where, literally speaking, blood is supposed to have been shed, the presumption would, with better colour of reason, plead for the fixing upon the butcher in preference to the non-butcher for the delinquent, than for the exclusion of the butcher from the faculty of officiating in the character of the occasional sort of judge called a juryman. It seems altogether impossible to find a reason why, in a capital case more than in any other, a butcher should be more disposed than another man to do injustice; altogether easy to find a reason why a lawyer should. Lord Chancellor Jefferies and Judge Page, of hanging memory, were not butchers.

Singly, (much more if in conjunction), a certain degree of opulence and rank in life are enough to render scarcely credible on any evidence, a fact for which, in another station in respect of rank and opulence, slight evidence would be sufficient to gain credence. In any of the civilized nations of Europe, what evidence would be sufficient to convict a prince of the blood, or a minister of state, of having picked a man's pocket of a dirty handkerchief, in a street, or in going into a playhouse?

One particular case there is, in which the force of the presumption derived from this source is not quite so great as, on general considerations, it might appear. This is the case of thefts committed on articles possessing a value of affection; and, in particular, thefts committed by amateurs on fancy articles; rare books, rare pictures, rare plants, shells, minerals, rare any thing. A man who might be trusted with safety with a heap of untold gold, might not be capable of resisting the temptation presented by some choice desideratum, which, if to be sold, might be to be purchased for a few shillings.

The warning afforded by this observation is happily of no great use in practice. Theft of special concupiscence are the offences of the rich: thefts of general concupiscence are the offences of the poor. Theft of the former description are apt to experience a degree of indulgence, in which the principle of sympathy and antipathy will naturally find much to reprobate, but to which the principle of utility is by no means equally severe. The alarm in this case is extremely narrow: few

but amateurs have any thing to fear from the thefts of amateurs; and the mischief which the negligence of an amateur has to fear from the concupiscence of another is confined to simple theft; to the more formidable mischiefs of robbery, house-breaking, and murder, the apprehension does not extend. Hence it is that thefts of this description, in the few instances in which they are detected, experience commonly a degree of indulgence such as would not be extended to those which have the plea of *necessity*, or at least of *indigence*, for their excuse. Hence too it is that the indulgence extended to them is not productive of any such general mischief to society, as would be the result of the like indulgence, if extended with equal frequency to promiscuous thefts.

In some cases, the question in regard to opulence and rank in life enters into the essence of the cause: the probability and improbability of the main fact in dispute is in a manner governed by them: and in these cases, whether character be or be not expressly held up to view, it is in a manner impossible to it not to act, with more or less force, upon the mind of the judge.

Take the famous case of the Comte de Morangiès, in Linguet's *Plaidoyers*. The Count,—having occasion to borrow money to the amount of 300,000 livres, —with evident though not unusual imprudence, trusts an obscure female money-broker, and through her means a pretended money-lender, with bills of his, payable to order, to that amount and upwards. Of this large sum no more than 1,200 livres were really delivered. The pretended lender proves the

delivery of the whole, by the testimony of three pretended eye-witnesses. The whole cause of the unfortunate man of quality rests upon circumstantial evidence: upon improbability, partly of the physical,* partly of the psychological kind. Station, in respect of rank and opulence, on both sides, but more especially (in respect of opulence) on the part of the pretended lender, became a necessary subject of inquiry. Traced out from the time of the pretended acquisition of this large fortune to the time of the disposition thus pretended to have been made of it, the whole history of her life and conversation concurred in representing the fact of her having possessed it, or any thing like it, as scarce credible upon any testimony, — absolutely incredible upon the strength of the testimony produced.

* The money, having, according to the evidence on that side, been delivered, by being carried, by the same person, at thirteen different times, a certain distance within six hours, — could not, within that time, have been carried to that distance.

CHAPTER XIV.

POSTERIORA PRIORUM — PRIORA POSTERIORUM. FACT INDICATED, A PRIOR EVENT; EVIDENTIARY FACT, A POSTERIOR EVENT IN THE SAME SERIES: AND E CONVERSO.

THESE two topics are scarcely susceptible of a separate consideration: no two can be more intimately connected.

In any series of facts, (the existence of acts or other events, — the existence of works, physical or psychological, the fruit of such acts or events) following each other in the character of so many successive means leading to a common end, of so many successive effects originating in a common cause; — the existence of a posterior article will naturally serve as evidence of the existence of each prior article: and, *è converso*, the existence of a prior article will operate, though commonly with much less force, in the character of evidence of the existence of each posterior article.

With a view to cases of a penal nature, these topics have been already handled, under a variety of modifications: handled, not under their own names, but under the names of their respective

modifications. Fear (for example), fear of punishment, being the natural consequence of delinquency, operates as evidence of it. Preparations for a crime, being among the causes of the pernicious event, operate as evidence, serving to fix upon the person who is ascertained to have been engaged in them the authorship of that event.

The sort of facts that remain for consideration on the present occasion, are those that are liable to come in question in cases of a non-penal nature. Examples:

1. A voyage or journey of considerable length. Evidentiary fact, the arrival of the traveller at the *terminus ad quem*: facts indicated, his appearance and transactions at the several intermediate stages. *E converso*; evidentiary facts, his appearance and transactions at any of the intermediate stages, coupled with evidence of his intentions of conveying himself to the *terminus ad quem*: fact indicated, his arrival there.

2. General settlement of a man's property, by deed *inter vivos*, or testament. Evidentiary fact, the execution of the appropriate written instrument: fact indicated, the existence of transactions and scripts, (letters, papers of instruction, &c.), preparatory to that event. *E converso*; evidentiary fact, the existence of a transaction or script of a nature preparatory to such event: fact indicated, the ultimate event itself.

3. Entrance into a new condition in life: *e.g.* marriage. Evidentiary fact, the celebration of the marriage ceremony: facts indicated, preparatory transactions and scripts; *tête-à-tête* conversations; overtures to parents or guardians;

love-letters; bespeaking of the ring and wedding clothes; housekeeping preparations; publication of banns, or obtainment of license, &c. *E converso*; evidentiary fact, any one or more of these preparatory incidents: fact evidenced, the performance of the ceremony.

4. Engaging in a profit-seeking occupation: engaging in a partnership. The preparatory steps will be infinitely diversifiable, according to the particular nature of the occupation in each case. To pursue the exemplification further seems unnecessary.

5. Litigation. Evidentiary fact, the ultimate decision: or, in cases requiring active execution, the extra-judicial transactions designated in each particular instance by that word: facts indicated, the several preparatory transactions and scripts of procedure, according to the nature of the case. *E converso*; evidentiary fact, the existence of any such preparatory transaction or script: fact evidenced, ultimate decision of the cause, in favour of the demandant or the defendant, according to the particular nature of such cause.

From this general view of the subject, several observations may be deduced: observations, some, — if not all, of which, may appear too obvious to be worth mentioning: but there is no observation so obvious as not sometimes to be overlooked.

1. In every such natural series, facts posterior and prior are naturally evidentiary of each other.

2. The probative force of posterior events in regard to prior ones, is naturally much stronger

than that of prior events with regard to posterior ones.

In all human affairs, execution is better evidence of design, than design of execution. Why? — Because human designs are so often frustrated.

3. When the posterior event indicated by a prior event did not take place, it will in most instances happen that the failure will have been proved by some notorious or easily-proved facts, by which, in this case, the probative force of the prior event with reference to the posterior will have been entirely destroyed. But sometimes it will happen, especially in the transactions of a remote period, that no completely satisfactory evidence is forthcoming, either of the failure of the design or of the consummation of it. As far as this is the case, the modification of circumstantial evidence here called for shortness *priora posteriorum*, may beyond question have its use.

A state of things may be supposed, in which the probative force of this species of evidence might be estimated, or rather observed, with the utmost nicety. This is where, on the one hand the instances in which the design has proceeded to the stage of consummation, on the other hand the instances in which the execution has stopped short at any of the several preliminary stages, have been made the subject of official or other trustworthy registration.

The case thus put is not absolutely out of the reach of practice. In different degrees it has been exemplified in different countries and different courts in the practice of judicial registration. It might be, and generally speaking ought

to be, exemplified in the most perfect degree in the practice of all such courts.

When the ends of justice are taken for the ends of judicature, a system of forensic book-keeping will be employed, by which it will appear in what degree fulfilment is given to those salutary ends. It will be apparent, in each individual cause, at what price, in the shape of expense, vexation, and delay, justice (or what is given for justice) is purchased: and likewise what proportion of that price is the result of natural and unavoidable, what of factitious, and therefore avoidable, causes. In that state of judicial book-keeping, the mode and period of termination will in each cause appear of course.

Under such a system of book-keeping, the termination of each cause being manifested by direct evidence, there will not (it may be said) be any demand for any such circumstantial evidence as is here in view. The facts of all stages being on record, posterior ones as well as prior ones, there will be no use in any such operation as that of inferring the existence of either from that of the other.—But, in regard to any given individual cause, suppose the memorials of a posterior transaction or script to be unforthcoming: destroyed, obliterated, lost, or inaccessible. In this case, any prior article of the same series may afford inferences, and have its use.

In another way, a rational system of judicial book-keeping might have a much more extensive use, and still in the character of a source of this modification of circumstantial evidence. The application given to such a register might not only be prospective but retrospective. The

negligence of preceding legislators might in some measure be repaired by the diligence of succeeding ones. Two equal spaces of time are taken, say of ten years each: the posterior, a period of perfect registration, as above: the prior, a period when registration was more or less imperfect, or altogether deficient. In the period of imperfect registration, a certain cause, it is known, proceeded to a certain stage: what is the probability of its having arrived at the ultimate stage? and, in that case, of its having terminated in favour of the demandant rather than of the defendant? Turn to the accounts of the period of good book-keeping, the probability of the two events will be respectively found in numbers.

CHAPTER XV.

ON THE PROBATIVE FORCE OF CIRCUMSTANTIAL EVIDENCE.

SECT. I. — *What ought to be done, and what avoided, in estimating the probative force of circumstantial evidence?*

ON this as on every other part of the field of evidence, rules capable of rendering right decisions secure, are what the nature of things denies. To the establishment of rules by which misdecision is rendered more probable than it would otherwise be, the nature of man is prone. To put the legislator and the judge upon their guard against such rashness, is all that the industry of the free inquirer can do in favour of the ends of justice.

Probative force of the evidentiary fact in question, in relation to the principal fact in question,—and closeness of connexion between such evidentiary fact and such principal fact,—are interconvertible expressions.

Probative force, and closeness of connexion as between fact and fact, having no more than an apparent and relative existence, (relative,

viz. relation being had to him by whom the facts are contemplated in this view); nothing more can be truly indicated by them than strength of persuasion on his part,—strength of persuasion, applied to evidence of the description in question, viz. to circumstantial evidence.

On each individual occasion, the degree of strength at which the persuasion stands would be capable of being expressed by numbers, in the same way as degrees of probability are expressed by mathematicians, viz. by the ratio of one number to another. But the nature of the case admits not of any such precision as that which would be given by employing different ratios (*i. e.* different pairs of numbers) as expressive of so many uniform degrees of probative force, belonging one of them to one *sort* of circumstantial evidence, another to another.*

Of an evidentiary fact of the same description, described in and by any combination whatsoever of general words, the probative force will be found different in different individual cases. It may be in any degree slight; and it may be strong in almost any degree short of conclusive.

The use of infirmative suppositions is to afford a test of conclusiveness, and, in some sort, of probative force.

To judge whether, with relation to a given principal fact, a given evidentiary fact be conclusive or no, look out on all sides for all such infirmative suppositions as can be found.

* But, for a practical purpose, such as that of judicial decision, the nature of the case seems to afford a particular mode of expression, an account of which has been already seen in a chapter in the introductory part of the work.

If, with relation to a given fact proposed in the character of a principal fact, another fact given in the character of an evidentiary fact appear to you as operating in that character,—operating in any degree howsoever slight;—look round to see if no supposition operating upon its probative force in the character of an infirmative supposition be to be found: no fact which in its nature is not impossible, and with which (supposing it, on the occasion in question, realized) the existence of the principal fact in question would be incompatible; or in virtue of which the existence of the principal fact would be seen to be less probable. If any such infirmative supposition be found, the probative force of the evidentiary fact is not so great as to be conclusive.

But if, after your utmost endeavours, you find yourself unable to discern any such infirmative supposition; then, in your own particular instance (relation had to the state of your own persuasion), the probative force may be conclusive.

Supposing one evidentiary fact, and only one infirmative supposition applying to it: then, to estimate (*i. e.* express in numbers) the quantity of probative force remaining to the evidentiary fact, — deduct from the ratio expressive of practical certainty, the ratio expressive of the probability of the fact the existence of which is by the infirmative supposition supposed: the remainder will be the neat probative force.

To one and the same evidentiary fact, suppose a number of different infirmative suppositions applicable; and, of each of the several supposed facts, suppose the probability the same;

the sum of their infirmative forces will be as their number.

In an evidentiary chain composed of a number of links, of which the first is a fact proved by direct evidence, the last the principal fact in question, and between them one supposed fact at least, of which the fact proved is regarded as evidentiary, and which itself is regarded as evidentiary of the principal fact; the greater the number of such intermediate links, the less is the probative force of the evidentiary fact proved, with relation to the principal fact. Why? — Because, of the several facts thus evidentiary one of another in a chain, each is liable to have its infirmative counter-probabilities, by the disprobative force of each of which, as above, its neat probative force is liable to be diminished.

Accordingly, on the occasion of each such chain, let it be your care to see that no intermediate link or links, with their respectively applicable infirmative suppositions, be omitted.

From the probative force of each evidentiary fact applying to the same principal fact, that of every other will receive an increase.

But no reason can be given for concluding that the sum of the probative force of such evidentiary facts will be uniformly as the number of the facts themselves.

On looking over, for example, a table or list of evidentiary facts, having for their common principal fact delinquency; it will be found that, in more instances than one, two evidentiary facts, of each of which taken by itself the probative force would be scarcely worth regarding,

shall, when taken together, be found to operate with a very considerable degree of probative force: so considerable as to be, if unopposed by any counter-evidence on the other side, conclusive. Or if two, thus unopposed, be not sufficient, three may, and so on.*

* A number of facts, each of which taken by itself proves nothing, or next to nothing, but the probative force of which, when all taken together, amounts to something considerable, constitute what is called in common language a *chain* of circumstantial evidence.

In this instance, however, the word *chain* is used in a different sense from that in which it has already been, and will hereafter be, employed in this work.

Where the phrase *chain of evidence*, or any phrase of analogous import has been made use of in the present work, it has always been intended to designate a series of facts, each of them standing in the relation of an evidentiary fact with respect to that which stands next to it in the series. If A be evidentiary of B, B of C, and C of D, then A, B, C, and D constitute, in this sense of the word, a *chain* of evidence.

Such combinations or series of evidentiary facts have already been brought to view under the name of concatenated facts,—facts constituting a *chain* of evidence: viz. combinations of psychological facts thus connected in a chain. Other chains of the like nature will hereafter be necessarily brought to view: chains of oral evidence in the form of hearsay evidence; chains of written evidence in the form of transcriptural evidence. The more mouths a narrative has passed through, the less trustworthy it is universally understood to be: the more copies have been taken the one from the other of a written original, the less trustworthy the last of them is understood to be.

To none of these instances has the metaphor, the necessary metaphor, of a chain, been applied as yet in jurisprudential language. Nor yet is the figure of speech, or the term, by any means unusual in jurisprudential language. It is, on the contrary, in every day's use. But the occasion on which, and on which alone, it is in use, is so widely different, that the practical consequences drawn from the use of it are directly opposite. On the occasions above brought to view, the greater the number of links there are in the chain, the weaker it is: on the occa-

Of facts of the psychological class, there is no one species of evidentiary fact, the probative

sions ordinarily in view, the greater the number of links there are in it, the stronger it is.

On the new occasions on which I have here found it necessary to employ the metaphor, the use made of it is more conformable than on the already customary occasions, to the nature of its material archetype. Take an iron chain, the more links you add to it, the weaker you will make it, not the stronger: and by adding link to link, you will at last make it break by its own weight. If, then, it be our wish to avoid confusion and self-contradiction, we must by some means or other contrive to express the distinction between the two opposite kinds of evidentiary chains: styling the one, for example, the *self-infirmative* chain, we may style the other the *self-corroborative*.

Exemplifications of the self-corroborative chain of evidence, are, in a form more or less distinct, in the mind of almost every man, and require only to be fixed by words. In the course of his progress to and from the scene of action, lawful or unlawful, a man is seen by different persons at different places. The respective testimonies of these several persons, each of them declaring the facts present to his senses, constitute together what has been usually and hitherto exclusively understood by a chain of evidence. This is what I call the *self-corroborative* chain.

Let it be a question, for example, whether on a particular day Titius went from London to Portsmouth: and let it be out of doubt that on that day at six in the morning he was seen on horseback at one of these places, to wit London, and that by one witness it is proved that at six o'clock in the afternoon he was seen at Portsmouth. It is evident, that, the greater the number of intermediate places I can prove him to have been at, at correspondent hours, the stronger the persuasion I shall produce in the mind of the judge of the existence of the principal fact in question, viz. that of Titius's having gone that day from London to Portsmouth. The journey in question will thus be proved upon him by a chain of evidence composed of as many links (say six) as between those two places there are stages at which he was seen by so many different persons. Double the number of the stages, and thence of the witnesses; instead of 6 call them 12; you double the strength of the stream of evidence.

force of which can with propriety be considered as being in all cases conclusive.

Why? Because, as hath already been seen, there is not one, the probative force of which is not liable to be weakened by different classes of facts, distinguished on that consideration by the appellation of infirmative facts.

Among physical facts, one may be evidentiary of another with any degree of probative force; and accordingly with a degree of force sufficient to be regarded as conclusive.

On this head, see what, under the head of *physical incredibility*, is said farther on, of the three modifications of extraordinary facts, viz. facts amounting to a violation of a law of na-

In another case, (instead of my six witnesses, each of whom saw Titius at a different stage in the road between London and Portsmouth), my evidence consists of the alleged testimony of six alleged witnesses, of whom the first (as I allege) saw Titius at the time in question at Portsmouth, he having said as much to the second, who said as much to the third, and so on to the sixth, being the witness I produce in court to prove the existence of Titius at Portsmouth at that time. It is manifest enough that the testimony of each of these witnesses loses more or less of its strength by their being disposed in a chain thus constituted: and that the chain, if it consisted of the testimonies of twelve such witnesses instead of six, would, instead of being twice as strong, be twice, or perhaps more than twice, as weak as before.

In conclusion, the distinction between the self-infirmative chain and the self-corroborative chain of evidence appears to be this. In the former case,—so many witnesses, so many intervening mediums interposed between the source of evidence and the faculties of the judge: and, the fact so evidenced being but one and the same fact, and the source from whence the evidence issues being but one source, the testimonies of all these witnesses put together compose but one article of evidence.

On the contrary, in the case of the self-corroborative chain, so many distinct evidentiary facts, so many distinct sources of evidence.

ture, facts devious from the course of nature in *degree*, facts devious in *specie*. If, the existence of fact A being supposed, the non-existence of fact B would be a violation of any law of nature, or devious in degree or specie to such a degree as to be incredible, the probative force of fact A, in relation to the existence of fact B, may be deemed conclusive.

Thus, in regard to quadrupeds, take the two facts, parturition and sexual conjunction. Between these two facts, parturition is the indicative fact, sexual conjunction the fact indicated by it; and, of the former, the probative force, in relation to the existence of the latter, may be pronounced conclusive.

Among physical facts, however, even such as are the most completely conclusive, the conclusiveness affords no sufficient reason for the establishment of unbending rules, imposing on the judge the obligation of forming the conclusion indicated.

Why? Because, in proportion as the rule is safe, secure against being productive of erroneous decision, it is in the same proportion useless. Safe, it is not effective; effective, it is not safe.

Suppose a rule laid down, that, in every cause in which virginity may happen to come in question, parturition shall be regarded as a fact conclusively disprobative of it. The rule would be innocent enough; but where would be the use of it? Is there any the least danger, that, by any judge or set of judges by whom parturition has been admitted to have been satisfactorily proved, the existence of sexual intercourse should be disaffirmed?

If the establishment of any one such rule

would be proper, so would that of as many others as could be constructed. But in this way a complete system of physical science would be to be established by authority, and engrafted into the system of judicial procedure and limits to the improvement of every branch of physical science, and especially of the most important of all—the medical—would be fixed by law.

No rule ought to be laid down, rendering the exhibition of this or that evidentiary fact necessary as a condition *sine quâ non* to a judicial decision affirming or assuming the existence of any other fact in the character of a fact indicated, and requiring for the proof of it the proof of such evidentiary fact.

Reasons.—If the probative force of the other parts of the evidence is not sufficient to produce persuasion on the part of the judge, persuasion will accordingly not be produced; and the rule restraining the judge from acting on the ground of such persuasion will be unnecessary and useless. If the probative force of the evidence is sufficient to produce such persuasion, and such persuasion is produced accordingly, although the proof of the evidentiary fact in question be wanting,—the restrictive rule is improper, prejudicial to the interests of truth and justice.

In the history of law, be the country what it may,—the further we go back, the more numerous the instances we may expect to find of convictions and executions on insufficient evidence: but, for the opposite reason, the longer we go on in the track of civilization, the more rare we may expect to find the instances of such errors

in judicature as have the weakness of the mental faculties for their cause. It is in the strength which, by the continually-increasing stock of information, may be given to the mental faculties of judges by apposite instructions drawn from correct and comprehensive views of the subject, that the true preservative against such errors is to be looked for : not in the restrictive operation of unbending rules of evidence.

If there be any cases in which any such unbending rules promise upon the whole to be beneficial to the interests of truth and justice, the two following seem to be of the number :

1. Where, — the mischief of the decision, if erroneous, being in a certain respect irreparable, and (by reason of the distance of the tribunal from the seat of government or otherwise) the confidence reposed in it by the legislator inferior to that which is reposed by him in some other and higher tribunal, — cases are accordingly marked out, in which, on the ground of evidence of such or such a description, or without the concurrence of evidence of such or such a description, a decision productive of such irreparable consequences shall not be pronounced, or shall not be executed.

It is upon this same principle, that, in the Austrian code, certain offences are marked out, such as magic and witchcraft, in relation to which the inferior tribunals of distant provinces are forbidden to proceed upon any evidence.

2. The other case comprehends in its whole extent the range of capital punishment: the only species of punishment which is absolutely and totally irreparable. But, of the consideration of this irreparability, what is the true re-

sult? The impropriety of this mode of punishment: not the propriety of those unbending rules.

In the instance in question, it was the consideration of the nature of the punishment—of the property thus belonging to it—that called into action the humane temerity of the judge. In every system of law into which this irreparable mode of punishment has been admitted,—but most of all in the English system, in which the fondness shewn to it is so great, and so continually upon the increase,—the system of procedure in general, and of the law of evidence in particular, teems with rules and practices tending to the encouragement of criminality in every shape, and most of all in such as are most mischievous. Capital punishment has thus been all along operating, and will continue to operate with continually increasing force, as a slow poison upon the whole system of procedure, including that of evidence. Thus it is that the work of real inhumanity and of false humanity, of folly under that specious name, go on together: and, while substantive law, with its favourite and unwearied instrument, capital punishment, is straining every nerve to tighten the bands of society,—adjective law, with its prejudices and inconsistencies, is as pertinaciously employed in loosening them.

From the above theoretical propositions, the following practical instructions of a monitory nature seem deducible:

I. Warnings tending to prevent under-valuation.

1. Reject no article of circumstantial evidence on the score of weakness.

2. Much less on the score of its not being conclusive.

3. Hold not the aggregate mass insufficient, for the separate insufficiency of the elementary articles.

4. Hold not an aggregate mass of circumstantial evidence insufficient, for the mere want of an article of this or that one description.

5. Hold not circumstantial insufficient, as such, for the mere want of direct evidence: viz. where direct evidence is not obtainable, or not without preponderant inconvenience in the shape of delay, vexation, and expense.

6. Hold not direct evidence insufficient, merely for the want of circumstantial.

II. Warnings tending to prevent over-valuation.

7. (1.) Set down no article, nor any aggregate mass, of circumstantial evidence, as even provisionally conclusive *in all cases*.

8. (2.) Much less as conclusive against, or (what comes to the same thing) to the exclusion of, all counter-evidence.

9. (3.) Content not yourself with general circumstantial testimony, when you can have special direct testimony from the same source.

10. (4.) Whatever evidence (in particular, circumstantial evidence) other than that produced by interrogation of the respective parties, presents itself; if the situation of the party be such as to present any probability of his being able to give explanation of it (*i. e.* to contribute either to give completeness or correctness to it, or to the inferences deducible from it),—fail not to employ interrogation,—judicial interrogation, applied to the party,—for the explanation of it.

11. (5.) Reject not circumstantial as needless, on account of the abundance of direct.

SECT. II. — *Errors of jurists, from neglect of the above rules.*

THE warnings given above are (it may be said) reasonable enough; but are they not too obviously so to be of any use?

Among the errors thus pointed at, not one perhaps that has not been embraced in practice, propagated by law-writers, or (what is worse) carried into effect by legislators and by judges.

In each part of the field of evidence, after what presents itself as the path of utility and reason has been traced out, the course taken in the present work is to bring to view the deviations made from it by the most distinguished systems of established law, the Roman and the English. Such, accordingly, is the course pursued on the occasion now in hand: except that, — as exemplifications of such deviation cannot be found for every one of the above monitory rules, — to supply the deficiency, the view given of the established practice in the two systems will here be preceded by a few examples, taken from the speculations of jurists, whose notions in regard to the points in question do not appear as yet to have been on any occasion explicitly adopted, so as to have given birth to practice. With a view to this particular subject, the order given to the monitory rules should also have been given to the examples: but, to avoid confounding unauthoritative notions with authoritative practice, the particular principle has been sacrificed to the general one.

1. An aggregate body of circumstantial evidence treated as insufficient, on the ground of the separate insufficiency of the elementary articles.

When, in a penal cause, the charge is supported (as is commonly the case) by a number of evidentiary facts, with or without direct testimony to the principal fact in question; a natural, and, on the part of the advocate for the defendant, a necessary course, is, to take the body of evidence to pieces,—to examine each member of it, each evidentiary fact, separately,—and, from the inconclusiveness of each, to infer the inconclusiveness of the whole.

In the case of Captain Donnellan, on the criminative side no article whatever of direct evidence was produced, but a prodigious number of criminative facts—articles of circumstantial evidence. After he was executed, a book was written to prove the evidence insufficient. Each criminative fact was taken separately: how inconclusive this! how inconclusive that! and so on: each being inconclusive of itself, the inference was, that so they were all of them put together. Of the individual premises, each taken separately, the truth was undeniable; but the collective conclusion did not follow.

Donnellan practised distillation: as a proof of poisoning, what did that amount to?—next to nothing. At that rate, all distillers would be poisoners. Not engaged in that or any other occupation with a view to profit, nor yet occupying himself with chemistry in any other shape, still he practised distillation: what did that again amount to?—some small matter, perhaps, but very little more. At that rate, all

the Lady Bountifuls (a class which, though not quite so numerous as formerly, is not yet quite extinct) would be poisoners.

He distilled what there was reason to think was laurel-water,—a known poison, not known to be used for any other purpose: the proof strengthens, though still very far from conclusive.

Thus much as to preparations, though there were others in the case. Go on next to *motives*. The relation of the defendant to the deceased was such, that, upon the death of the latter, a large property was to devolve upon the former. Here, then, was temptation—a sinister motive, to which he stood exposed. What he saw, what he could not but see, was, an advantage (and that to a great amount) on the point of accruing to him on the happening of that event. In that point of view, he was urged by a particular species of motive (pecuniary interest) to use his endeavours for the bringing about of that event. In that point of view, he stood exposed to the impulsive action of that motive. Does it follow that he yielded to the impulse? Here was a survivor who had profit in expectancy upon the death of the deceased. Does it follow that, at the expense of so horrible a crime, he used his endeavour for the procuring of such death? At that rate, the most common of all causes of death is parricide.

Ill-humour has been observed between man and wife: the woman dies. Is this a proof that she died by murder, and that her husband was the murderer? At that rate, the few couples excepted who might be capable of

making title to the flitch at Dunmow, all married men and all married women are murderers.

2. An aggregate body of evidence held insufficient, for want of a particular article of circumstantial evidence.

In several instances that have been made public, and in a number greater than might at first view have been supposed,—a defendant has been convicted of the murder of a man, who has afterwards made his appearance in a living state.

In consideration of the fatal errors in judicature thus brought to light, instances have been mentioned in which a judge has declared his resolution never to concur in any conviction of murder, where the dead body has not been found. But a resolution known to be thus declared, (at least if corroborated by a known instance in which such resolution has been acted upon), is sufficient to give birth to a rule of jurisprudential law.

The motive of the determination was evidently a laudable one: but the consequences of the determination, if converted into a rule, and that without exception, and known to be so, would be in the highest degree prejudicial to justice. To secure to himself impunity, a murderer would have no more to do but to consume or decompose the body by fire, by lime, or by any other of the well-known chemical menstrua; or to sink it in an unfathomable part of the sea. In any of these ways might the body be effectually got rid of; and, though it were in the face of any number of witnesses,

the rule being established without the correspondent exceptions, impunity would follow of course.

Nor yet would the rule afford the security it aims at, without another condition, not expressed upon the face of it. The body found,—by what evidence is it to be proved to have been found? The judge before whom the prosecution for the homicide is to be tried,—is it to *his* eyes that the body is to be produced? This is not in any case what is meant. What, probably enough, is meant, though not expressed, is, that the existence of the body in a dead state should have been ascertained by the testimony of some ocular witness, whose trustworthiness is regarded as being exception-proof: for example, in English law, the coroner with his jury. For, if any testimony at large is to be regarded as sufficient, the intended security is gone. “I saw the body of Titius after he was dead:” “I saw Sempronius beat out the brains of Titius.” Falsehood may attach with as little difficulty upon the one speech as upon the other.*

* The evidence so anxiously looked out for by this worthy judge was of the sort which the Romanists have in view by the term *corpus delicti*,—the body of the offence,—in so far as they have any thing determinate in view. The *body* of the offence; meaning the fact of the offence: evidence of the fact of the offence,—evidence of that sort by which the fact of the offence may be indicated, without affording any indication of the person of the offender. In the case of real evidence, the indication thus afforded is frequently, though not constantly and necessarily, thus confined. In the case of testimonial evidence, the most natural case is, that the fact of the offence and the person of the offender should be comprised in the same narrative. That (in addition to direct tes-

3. An imperfect body of circumstantial evidence set down as conclusive, for want of due attention to supposable infirmative facts.

Of the need there may be for these warnings, an exemplification may be seen in the doctrine of Lord Coke.* Of his division of *presumptions* (*i. e.* of circumstantial evidence) into three degrees, in respect of force, — violent, probable, and light or temerarious, — mention has been made upon another occasion, in another place.† “*Violenta presumptio*” (says he) “is many times” (in many instances) “*plena probatio*” (full proof): and the instance he gives is this: — “As if one be run thorow the bodie with a sword in a house, whereof he instantly dieth, and a man is seen to come out of that house with a bloody sword, and no other man was at that time in the house.” “*Presumptio probabilis* moveth little, but *presumptio levis seu temeraria* moveth not at all.”

To the probative force of this body, or rather article, of circumstantial evidence, two facts present themselves in the character of supposable infirmative facts.

1. The deceased plunged the sword into his own body, as in the case of suicide: the accused, not being in time to prevent him, drew

timonial evidence) circumstantial, and more particularly *real* evidence, is highly desirable, and ought accordingly to be looked out for, especially in case of homicide, is evident enough. But a rule requiring it as indispensably necessary in all cases, would, besides the unreasonableness of it, be inconsistent with the necessary practice in regard to a large division of crimes. It is of the nature of all verbal offences, — offences committed by mere words, — not to be productive of any real evidence.

* Co. Litt. 6.

† Vol. I. p. 96.

out the sword, and so ran out, through confusion of mind, for chirurgical assistance.

2. The deceased and the accused both wore swords. The deceased, in a fit of passion, attacked the accused. The accused, being close to the wall, had no retreat, and had just time enough to draw his sword, in the hope of keeping off the deceased: the deceased, not seeing the sword in time, ran upon it, and so was killed.

Other suppositions might be started besides these; nor do these exculpatory ones either of them seem in any considerable degree less probable than that criminative one: if so, the probability of delinquency, instead of being conclusive, is but as 1 to 2.

Such is the evidence upon which the father of English jurisprudence would have pronounced a man guilty without scruple.

What it is he would have found him guilty of,—murder or manslaughter,—a capital crime, or a crime short of capital,—he does not say: murder, probably enough; since manslaughter, being a sort of alleviation, requires special evidence: murder, accordingly, is the verdict which the coroner's jury find of course, where no alleviating circumstances, to reduce it to manslaughter, have presented themselves.*

* Here would come in one use of a table of circumstantial evidence. On the supposition of criminality, criminative circumstances of the description in question could scarcely fail to be accompanied by a variety of other circumstances of the same tendency:—apposite motive, apposite disposition, previously-known enmity, preparations, previous threats, confessorial discourse, criminative deportment (contemporary or

SECT. III. — *Defects of established systems, from neglect of the above rules.*

1. GENERAL circumstantial testimony, received to the exclusion of special direct testimony from the same source, as also of all counter-evidence, is exemplified in the instance of the several sorts of actions or suits to which the evidence called *wager of law* applies. Restoration of a specific thing is claimed at the defendant's hands. By whatsoever body of apposite evidence, direct or circumstantial, the claim is supported; the defendant is allowed to adduce the counter-evidence thus denominated, and the evidence in support of the claim becomes inadmissible. The defendant comes into court, and denies, in general terms, the fact (whatever it be) on the ground of which the obligation is sought to be imposed upon him. Along with him comes a posse of other witnesses: number, a dozen, neither more nor less. They know nothing about the matter; but, by the opinion they have of him, they are certain that what he says is true. The

subsequent); all these articles of psychological evidence, under all or any of their numerous modifications; not to mention such further real evidence as might have been afforded by a transaction so described.

One mode, and that not a very unobvious one, of throwing light upon so dark a subject, would have been to subject the accused to a judicial examination. But this, for any other purpose than that of judging whether to commit the man or let him out to bail, an English lawyer (if not then, at least now) would start from and be shocked at. *Nemo tenetur seipsum accusare*. Pronounce a man guilty without examination?—yes; in this consists English mercy. Examine him, to judge whether he be guilty or not?—no; the idea is not to be endured.

evidence they furnish is so much character evidence.

Swearers of this denomination are like ghosts and witches : nowhere do they exist ; but in many and many a place they do as much mischief as if they did. Two or three sorts of actions are altogether laid asleep by them ; and the effect of it is, that, for no one moveable thing that he has, has an Englishman any remedy at law. Money is given him instead of it. The sum is never equal in value to the injury sustained by the want of the thing sought. To keep the thing, at the price thus put upon it, is always at the option of the wrong-doer.

In Roman law, general circumstantial testimony accepted in lieu of, or in addition to, special direct testimony from the same source, is exemplified in the cases where the oath denominated *juramentum expurgatorium** was employed. The cases being penal, and the evidence on the criminative side neither sufficient for conviction nor yet for torture, the judge might, if he thought fit, call upon the defendant to swear to his non-delinquency in general terms : of a fixed formulary for that purpose, I know no instance. The description of the practice is obscure and vague enough, like every thing else in Roman law.

In these as in all other penal cases, interrogation of the defendant himself was in the power of the judge : extraction, consequently, of a full body of confessorial evidence, or of the

* Heinecc. lib. XII., tit. ii., pars ii., p. 292.

denegatory testimony given by him in lieu of it (testimony, of which, on the supposition of delinquency, more or less must have been false).

Was this power employed? This was letting off a delinquent upon bad and unsatisfactory evidence, when, upon better evidence, and (in case of confession) the very best of all, he had been either shewn to be not guilty, or shewn to be guilty. This is recurring to inferior evidence, after receiving superior evidence from the same source. It is like Harpagon in the play : *— *Rends moi, sans te fouiller, ce que tu m'as volé* : the search had already been made, and produced nothing.

Has the power remained unemployed? This is employing the inferior to the exclusion of the superior evidence. It is as if the master, persuaded of the guilt of his innocent servant, had contented himself with saying to him—“ *tell me whether you are guilty or no* ;” forbearing purposely to make search.

Juramentum suppletorium.—This was an oath in certain non-penal cases. It possessed, in common with the *juramentum expurgatorium*, the feature which renders it applicable to this purpose. In different nations, on different occasions, it appears to have been employed in the character of an evidentiary fact ; right of some sort or other being the fact indicated, —right to some service, such as that very extensive sort of service which consists in the transfer of money or money's worth to the

* Moliere's *Avare*.

possessor of the right, — right to an exemption from an obligation of that or some other nature, sought to be imposed on him.

The error applicable to the present purpose consists in the acceptance of a vague assertion, in addition to, or to the exclusion of, a specific statement; of an article of weak circumstantial evidence, in addition to, or in exclusion of, a body of direct evidence from the same source.*

2. Evidentiary facts excluded altogether, under the idea of their being weak; and even under that of their not being conclusive.

In the case of this, as of every other species of evidence, the production of it should neither be compelled nor admitted, when by such compulsion or admission more evil will be produced in respect of the collateral ends of justice (*viz.* avoidance of delay, vexation, and expense), than by the exclusion of it, in respect of the direct end of justice, *viz.* by danger of indecision.

Except on this ground, however, there is no evidence, presented in the character of circumstantial evidence, the production of which ought not to be, not only permitted, but compelled. In particular, no such evidence ought to be excluded on the ground of deficiency in point of probative force.

Why should any be excluded? Operative, it is useful; inoperative, it is innocent.

* In addition to this error, comes that of forbearing to give justice the benefit of cross-examination, together with the other securities for trustworthiness that stand in connexion with that essential practice. But this latter is an error that belongs not to the present head. See Book II. SECURITIES.

The rashness with which, on different pretences, exclusions—peremptory and inexorable exclusions—have been put upon evidences of different descriptions by men of law, will be matter of ample observation in another place.* The ground which forms the subject of the present book is that on which this rashness has displayed itself with least violence.

From oral evidence,—circumstantial evidence orally delivered,—it seems to have abstained altogether: in the permanent texture of written evidence, it has found (as it were) solid ground to fasten upon.

In the shape of parol evidence,—be the evidence, when of this description, ever so slight, be the inference it affords ever so short of being conclusive,—there is no objection to the reception of it. In this shape, imagination cannot frame a circumstance more trifling, more inconclusive, than many are which have been admitted to be produced in evidence, and continue to be admitted in every day's practice.

Admitted?—Yes; and with great and just effect. Why? Because (not to speak of greater numbers) even two articles of circumstantial evidence,—though each taken by itself weigh but as a feather, —join them together, you will find them pressing on the delinquent with the weight of a mill-stone.

Give to the evidence in question the form of a written document, the treatment it meets with is reversed. An inexorable bar is now opposed to it. Presented by the mouth of a witness, be its value ever so small, it is allowed

* See Book IX. EXCLUSION.

to pass for whatever it is worth: presented in writing, if it fall short of being conclusive, it is not allowed to go for any thing.

So it be exhibited *viva voce*, no matter how remote and inconclusive the evidentiary fact reported by the circumstantial evidence. When received, the impression made by it may be slight, or amount to nothing; but the lightness of it, how extreme soever, is never made into a ground for the exclusion of it. It is only when consigned to writing that it is scrutinised before admission, and, if not looked upon as weighty enough to be conclusive, is thrown out as worthless. Rash exclusion on one side, or equally rash exclusion on the other: rash exclusion of the lot of evidence in question, or rash exclusion of every other evidence that might have been opposed to it: such is the only alternative.

A record (says the immortal Gilbert, the father of the law of evidence,) a record is a diagram whereby right is demonstrated. To appear, and not to command assent, is beneath its dignity: where demonstration enters, doubt finds no room to stand upon.

Numerous are the instances in which the admissibility of matters of record, in proof of the existence of other matters of record, has been disputed; and in some it has been disputed with success: with relation to the fact supposed to be indicated, the existence of the document in question has been pronounced no evidence; or (what comes to the same thing) the court has in that character declared it inadmissible,—refused to pay regard to it.

That the ultimate decision which has taken

place in consequence of this rejection has been contrary to truth and justice, is more than, in all or any of these instances, I could take upon me to affirm : an opinion to that effect, well or ill grounded, would be of no use : materials for forming it are not forthcoming. Possibly, in each one of these instances, had the document been received in evidence, and its probative force been taken into consideration, it would have been found inconclusive : that is, the whole of the evidence on that side (whether the document in question constituted the whole or only a part of it) would have been considered in that light.

Nor yet will I take upon me to say (for perhaps it may not be to be known, and, if it were, the result of the inquiry would not be worth the trouble) whether, in the several instances in question, the case was, that the evidence was rejected without consideration of the tenor of it. Excluded or no in fact, and in that individual cause, it appears at any rate in the character of a species of excluded evidence, in the books of law. Accordingly, in due form of legal architecture, a species of case is built upon the ground of it : and thereupon, as usual, in each succeeding cause in which the same or a similar point presents itself, the question is, — not whether the fact happened, — but whether the individual case in hand belongs or does not belong to that species of case.

What is the consequence ? Though, in the individual case in hand, not a person concerned that is not persuaded of the existence of the fact indicated, — the existence of the document which, supposing it to exist, would be decisive ;

persuaded, and that by the other document the existence of which is exhibited in the character of the evidentiary fact; yet still the decision is to be directly contrary.—Why? Because the case is of the same *species* as that in which, in the former instance, an evidentiary document of the same or a similar species was regarded as inadmissible.

What, then, is the practical conclusion here contended for? It is this: viz. that no article of evidence, the nature of which is to operate in the character of circumstantial evidence—whether it be presented in the form of oral or of written evidence, and (if in the form of written evidence) whether in the form of a judicial document or any other,—ought equally to be admitted: the judge of fact being left equally free, in all these cases, to form his judgment of its probative force. That accordingly, in those instances where (as in England) the function of the judge of fact is exercised by a jury, the question respecting the probative force of the document in question, with reference to the fact alleged to be indicated by it, ought to be suffered to be submitted to them; in the same manner as the probative force of any article of circumstantial evidence exhibited to them through the medium of oral testimony.

Circumstantial evidence at large (supposing no legal cause of exclusion opposable to the testimony of the reporting witness), circumstantial evidence, as such, is supposed to go to a jury; who, being simple and unlearned persons, are left to judge of it in their own way, without any better light for their guidance than the light of common sense. But it would be

beneath the dignity of the sages of the law to suffer themselves to be led by any such vulgar guidance. When they judge, it must be by rule and measure : practice, not reason, is their guide. To judge of the probative force of evidence is not their practice : it is an operation out of the sphere of their practice, and beneath it. The sort of question to which they are in use to find answer, is, whether a piece of evidence shall be admitted or excluded. Between being admitted and being deemed conclusive ; between a man's being heard, and his exercising an absolute command over the decision ; there is in the nature of things a medium obvious enough. But whatever there may be in the nature of things, in their practice there is none. If admitted (says the lawyer to himself) it is that sort of evidence that must be conclusive : for who is there that shall take upon him to pronounce it otherwise ? Not I : it is not our province, it is not our practice, to weigh the force of evidence. Not the jury ; for, being a law document, it belongs not to them to judge of it ; such matters are too high for them. If I considered it as conclusive, — insomuch that, were I to take it into consideration, I should regard it as absolutely demonstrative of the fact indicated ? — Yes. But could I regard it in that light ? No, I could not. What, then, is to be done with it ? Done with it ? — why, what else can be done with it than what we are so much in the habit of doing by evidence of all sorts, and for any the slightest reason, or no reason ? — shut the door against it, and refuse to look at it.

3. A single article of circumstantial evidence,

set out as being of itself conclusive (viz. of the existence of the fact indicated), is an incongruity exemplified in the case where, on the score of *interest* (*i. e.* exposure to the sinister and seductive action of this or that species of motive), a man is excluded from the faculty of giving testimony in the cause. Titius has such an interest in this cause, that, supposing him to swear falsely to such or such a fact, and thereby commit perjury, and supposing his testimony to be believed, he would be a gainer by such perjury. By the impulse of that *motive*, he is prompted to commit perjury; therefore, if heard, he would perjure himself; therefore he shall not be so much as heard. The exclusion is just as rational as if Donnellan had been convicted of the murder on no other evidence than that of his being next in remainder to the estate. If this were reason as well as law, no witness ought ever to be heard in the character of a witness: no man ought ever to be out of the pillory.

Observe, that, though the assumption here made were always realised, it would not still be sufficient to warrant the exclusion grounded on it. For the strongest interest which a witness can have in being guilty of mendacity is inconsiderable, in comparison of the interest by which a defendant under examination in a capital case is prompted to incur the same guilt: and *for this very reason*, the evidence which a man in this situation yields to his own prejudice is of all evidence the most satisfactory. But of this more fully in its proper place.*

* See Book IX. EXCLUSION.

SECT. IV. — *Circumstantial and direct evidence compared, in respect of probative force.*

IN respect of probative force, circumstantial evidence has sometimes been put into comparison with direct, both being considered in the lump: and, on a survey thus superficial, the superiority has sometimes been attributed to the one, sometimes to the other.

A few observations, for the purpose of clearing up the subject, may perhaps not be misemployed.

Possession of either affords, as observed above, no reason for neglecting the other.

But it may happen, that (especially in a penal case on the defendant's side) evidence of one of the two sorts may be supposed to be wanting: or, in a cause of any sort, on each of the two opposite sides, evidence of the one sort may stand single, or predominate.

Taking circumstantial in the largest sense, so as to include all the several modifications that have here been referred to that head; it has already been observed that in no case perhaps was ever a mass of evidence formed, consisting of direct evidence alone, without any admixture of circumstantial; more especially not in any disputed case: and the rather, as different portions of direct evidence will operate in support of each other, thus acting each of them in the character of circumstantial: direct evidence being that which affords not, or at least requires not, any inferences; whereas circumstantial is in a manner composed throughout of inferences.

But circumstantial evidence is, on the other hand, presented oftentimes without any admix-

ture of direct; and in that pure state decisions are often grounded on it.

Regarded in an abstract point of view,—the essence of the species being considered, without regard to the quantity naturally found in a state of conjunction, in the several individual cases,—the inferiority of circumstantial, as compared with direct, is out of dispute. Direct evidence requires no inference: circumstantial evidence is composed of inferences: and, as already observed, there is scarce an inference to which it may not happen to be fallacious.

Strictly speaking, in the case of direct evidence (it is to be observed) there is always indeed an inference; but this inference is in every instance of the same nature: from the report made by the witness, the inference that the facts contained in that report are true.

Of circumstantial evidence, by way of argument in proof of the superiority of its probative force over that of direct evidence, it has been said that it cannot lie. But it is only of certain modifications of circumstantial evidence that the proposition is true.

The evidence, and the only evidence, which cannot lie, is that which, without the intervention of any human testimony, presents itself directly to the senses of the judge. In this case is *real* evidence; and such involuntary evidence as is exhibited by the deportment of a party or an extraneous witness while undergoing the process of interrogation. In this same situation is even lying testimony (*false responsion*) itself, considered in respect of the inferences which, on the supposition of its mendacity, it affords; inferences in virtue of which its cha-

racter is changed from that of direct to that of circumstantial evidence.

But all evidence, which, in its way from the source of evidence to the senses of the judge, has passed through the lips or the pen of a human being, is no less susceptible of that pernicious quality than direct evidence is. And in this situation are all the remaining modifications of circumstantial evidence, (real evidence itself not excepted), when, by having passed through the lips or pen of a deposing witness, it has sunk into the state of *supposed real evidence reported*.

But it is only in so far as it is a cause of deception, and in so far as it acts with success in that character, that lying is productive of effects adverse to the ends of justice: and real evidence, it has been seen, is no less capable of acting in this character than direct personal evidence: real evidence, like written evidence, being, in the hands of a forger, a source no less capable of producing deception, than, when passed through a mendacious mouth or pen, the direct testimony of a deposing witness is.

Thus much, however, is true, viz. that it is only here and there by accident that *real* evidence is capable of being fabricated, or by alteration adapted to a deceptitious purpose: whereas there is no case in which it may not happen to man, in the character of a deponent, to stain his deposition by mendacity, if he sees what to him forms an adequate inducement, and is content to run the risk.

The features of advantage by which circumstantial evidence is in a more particular man-

ner fitted for rendering service to the cause of truth and justice, seem to be as follows :

1. By including in its composition a portion of circumstantial evidence, the aggregate mass on either side is, if mendacious, the more exposed to be disproved. Every false allegation being liable to be disproved by any such notoriously true fact as it is incompatible with ; the greater the number of such distinct false facts, the more the aggregate mass of them is exposed to be disproved : for it is the property of a mass of circumstantial evidence, in proportion to the extent of it, to bring a more and more extensive assemblage of facts under the cognizance of the judge.

2. Of that additional mass of facts, thus apt to be brought upon the carpet by circumstantial evidence, parts more or less considerable in number will have been brought forward by so many different deposing witnesses. But, the greater the number of deposing witnesses, the more seldom will it happen that any such concert, and that a successful one, has been produced, as is necessary to give effect to a plan of mendacious testimony, in the execution of which, in the character of deposing witnesses, divers individuals are concerned.

Thus, suppose a guilty defendant's reliance placed in a false mass of *alibi* evidence. The greater the number of mendacious witnesses, who depose to their having seen him at the time in question, at a place at which he really was not at that time, (they having been themselves each of them at a different place at that time), the greater the number of false depositions, each of which is exposed to be disproved

by true ones. And so in case of evidence to character.

3. When, for giving effect to a plan of mendacious deception, direct testimony is of itself, and without any aid from circumstantial evidence, regarded as sufficient; the principal contriver sees before him a comparatively extensive circle, within which he may expect to find a mendacious witness, or an assortment of mendacious witnesses, sufficient to his purpose. But where, to the success of the plan, the fabrication or destruction of an article of circumstantial evidence is necessary, the extent of his field of choice may in this way find itself obstructed by obstacles not be surmounted.*

One thing may, on this occasion, have a claim to notice: viz. that, in a great (probably the greater) number of instances, a fact necessary to be established in disfavour of the defendant's side—a fact necessary to be established on the part of the plaintiff,—belongs to that class of facts which is scarce capable of being proved to satisfaction without the aid of circumstantial evidence.

* Instances have occurred, where,—a forged instrument having been employed in the execution of a plan of depredation,—the employment of a paper with a wrong stamp has afforded the means of detection, by bringing to bear against the body of authenticating evidence a mass of de-authenticating evidence not to be resisted. On a species of stamped paper not in use (for example) till the year 1800, a deed was written, purporting to have been executed in the year 1799. The non-existence of any such paper at the time of the date being a fact of the utmost notoriety among the officers of the stamp-office, — the testimony of any one of them, being thus placed out of the reach of all effectual temptation to mendacity, would be sufficient to outweigh the opposite testimony of any producible number of ordinary witnesses.

In this situation, for example, are all those facts of a psychological class, the proof of which, as against the defendant, are necessary to his conviction; and which cannot be proved by direct evidence other than that testimony of his own — that confessorial evidence — which nothing but an assured expectation of a sufficient mass of inculpatory evidence from other quarters will ever prevail upon him to give. Criminative or otherwise inculpatory consciousness; inculpatory, criminative intentions; to which is added, in some cases, the existence and influence of this or that particular sort of motive:—to one or other of these heads may be referred the psychological facts, proof of which, one or more of them, is (in case of most of the offences occupying a high rank in the scale of criminality or penalty) regarded, and that justly, as indispensable.

But these are among the facts, the existence of which no defendant, who does not regard his case as rendered desperate by other evidence, will ever acknowledge. Proof, therefore, whatsoever they are susceptible of, if they receive, they must receive from extraneous evidence: and, until the parable of the man with windows in his breast be realized, such extraneous evidence cannot be of any other nature than that of circumstantial evidence, viz. under one or other of the modifications as herein above brought to view.*

* Extract from the printed pamphlet on *Circumstantial Evidence*, occasioned by Donnellan's case:—

“ We hear this observation every where echoed, ‘ Circumstantial evidence is the best, for circumstances cannot lie.’

But if we would give ourselves the trouble to bestow a little consideration upon the subject, I think we shall be convinced that circumstantial evidence is not the best, and that circumstances can lie. There are circumstances which cannot lie, where the conclusion or inference is necessary and unavoidable; but where the conclusion or inference is contingent, circumstances may lie; that is, we may draw an erroneous conclusion from the given facts. The learned Matthæus clearly describes this distinction: ‘Argumentum porro necessarium vel contingens est: necessarium, cujus consequentia necessaria est, veluti coivisse eam quæ peperit: contingens, cujus consequentia probabilis est, veluti cædem fecisse, qui cruentatus est; Atalantam virginem non esse, quòd cum adolescentibus spatietur sola per sylvas.’ In the first case, one fact is a certain demonstration of the other; but in the second, the circumstances must frequently lie, when they charge with murder a person stained with blood, or Atalanta, from such companions and conduct, with a want of chastity. But he proceeds to observe, ‘Contingentia verò quanquam singula fidem non faciant, plura tamen conjuncta crimen manifestare possunt. Rem uno atque altero exemplo declarabimus. Occisus est Kalendis Mævius: Titius perempti inimicus fuit; eidem sæpius non solum interminatus, sed et insidiatus est. Cum deprehenderetur iisdem kalendis, in loco cædis, cruentatus, cum gladio cruento, ad mensuram vulneris facto, toto vultu expalluit, interrogatus nil respondit, trepidè fugit. Hic singula quidem argumenta infirmiora sunt, universa tamen cædis auctorem Titium evidenter designant, rectèque Duarenius duxit, non dubitaturum se hunc reum carnifici jugulandum dare.’—Tit. 15. c. 6. Yet Duarenius might have condemned and executed an innocent man. Every one of these circumstances must be proved by positive witnesses, who may be either wicked or mistaken; but even if they are pure and correct, the conclusion we draw from the facts disclosed may be erroneous. So that in circumstantial evidence there must of necessity be more chances for error than in positive evidence. If any number of witnesses should swear they saw the prisoner draw a reeking sword from the side of a dead man, we have not the same degree of certainty that he either murdered or killed him, as if the same witnesses had sworn they had seen him run it through his body. It affords a violent presumption; but still, it might have been the friendly act of an innocent man, who had accidentally passed that way after the murder was committed; or even if

it was the prisoner's own sword, it might have been snatched from his side, and plunged into the body of the deceased by some one who had escaped; or the deceased might have borrowed it, and have fallen upon it himself. All human testimony is nothing more than a high probability; and it is true that circumstantial evidence in one case may produce a higher degree of it, or more nearly approach to certainty, than direct and positive evidence in another.

“ That both positive and circumstantial evidence may fail, will appear from the following cases: the first is in the chronicle of the Gentleman's Magazine for Oct. 1772; the other is from the 5th vol. of *Causes Célèbres*, p. 438, where several more such stories are related.

“ ‘ Sept. 14, 1772, came on, at the sessions in the Old Bailey, the trial of one Male, a barber's apprentice, for robbing Mrs. Ryan, of Portland-street, on the highway, on the 17th of June last. The witnesses swore positively to the identity of the lad, and the whole court imagined him guilty. He said nothing in his defence, but that he was innocent, and his evidences would prove it. His evidences were the books of the court, to which reference being made, it appeared that on the day and hour when the robbery was sworn to be committed, the lad was on his trial at the bar where he then stood for another robbery, in which he was likewise unfortunate enough to be mistaken for the person who committed it; on which he was honourably acquitted.’

“ ‘ Voici un autre fait, dont j'ignore l'époque, et qui m'a été transmis par la tradition. Avant qu'on eût rebâti cette longue suite de maisons qui bordent la place Saint Michel à Paris, en face de la rue Sainte Hyacinthe, une marchande veuve et âgée occupoit, au même endroit, une petite boutique, avec une arrière-boutique où elle couchoit. Elle passoit, dans le quartier, pour avoir beaucoup d'argent amassé. Un seul garçon composoit, depuis longtems, tout son domestique. Il couchoit à un quatrième étage, dont l'escalier n'avoit point de communication avec l'habitation de sa maîtresse; il étoit obligé, pour s'y rendre, de sortir dans la rue; et lorsqu'il s'alloit coucher, il fermoit la porte extérieure de la boutique, et emportoit la clef, dont il étoit seul depositaire. On voit un matin la porte ouverte plutôt qu'à l'ordinaire, sans qu'on remarquât aucun mouvement qui annonçât que la marchande ou son garçon fussent levés. Cette inaction donna de l'inquiétude aux voisins. Cependant on ne remarque aucune fracture à la porte; mais on trouve un couteau ensanglanté,

jetté au milieu de la boutique, et la marchande assassinée dans son lit à coups de couteau. Le cadavre tenoit dans une main une poignée de cheveux, et dans l'autre une cravate. Auprès du lit étoit un coffre, qui avoit été forcé. On saisit le garçon de boutique : il se trouve que le couteau lui appartient. La cravate que tenoit la marchande étoit à lui. On compare ses cheveux avec ceux qui étoient dans l'autre main, ils se trouvent les mêmes. Enfin, la clef de la boutique étoit dans sa chambre ; lui seul avoit pu, moyennant cette clef, entrer chez la marchande, sans fracture. D'après des indices ainsi cumulés et si concluants, on lui fait subir la question ; il avoue, il est rompu. Peu de tems après, on arrête un garçon marchand de vin, pour je ne sçais quel autre délit : il déclare, par son testament de mort, que lui seul est coupable de l'assassinat commis à la place Saint Michel. Le cabaret où il servoit étoit attenant à la demeure de la marchande égorgée. Il étoit familièrement lié avec le garçon de boutique de cette marchande ; c'étoit lui qui mettoit ordinairement ses cheveux en queue ; quand il le peignoit, il avoit soin de ramasser ceux que le peigne detachoit, et dont il avoit, peu-à-peu, formé la poignée qui s'étoit trouvée dans les mains du cadavre. Il ne lui avoit pas été difficile de se procurer une des cravates et le couteau de son camarade, et de prendre, avec de la cire, l'empreinte de la clef de la boutique, pour en fabriquer une fausse.'

"There is a species of testimony which is called the *evidentia rei* : though this must be introduced by positive evidence, yet, when produced, it speaks for itself, and requires no explanation. Of this nature may be mentioned two cases, which have happened within a few years upon the northern circuit : in one case, a man was found shot by a ball, and the wadding of the pistol stuck in the wound, and was found to be part of a ballad called "Sweet Poll of Plymouth," which corresponded with another part found in the pocket of the prisoner. The other also was a case of murder ; and in the head of the deceased there was a chip or splinter, which exactly fitted the cavity in a bludgeon from which a piece had been lately broken ; which bludgeon the prisoner carried in his hand when he was apprehended. Though this account of the two pieces of the ballad, and two pieces of the bludgeon, must be proved by positive testimony, yet the court and jury are as competent judges of the fitness and correspondence of the parts as the witnesses. *Cui adsunt testimonia rerum, quid opus est verbis?* These were certainly strong

corroborations of other circumstances; but if they had stood alone, they would have deserved little consideration; for if the ballad and the bludgeon had been thrown away by the murderers, they were objects likely to draw the attention of an innocent man, who would naturally have put one in his pocket, and have carried the other in his hand."

CHAPTER XVI.

OF IMPROBABILITY AND IMPOSSIBILITY.*

SECT. I. — *Improbability and impossibility are names, not for any qualities of the facts themselves, but for our persuasion of their non-existence.*

IMPOSSIBILITY and improbability are words that serve to bring to view a particular, though

* In putting together the scattered papers from which this work was compiled, considerable difficulty was felt in assigning its proper place to what Mr. Bentham had written on the subject of improbability and impossibility.

Had it been in the power of the editor to select that arrangement which appeared to him best suited to the nature of the subject, he would have placed so much of the present chapter as is merely explanatory of the *nature* of improbability and impossibility, in the first book, entitled THEORETIC GROUNDS; and so much of it as relates to the *probative force* of improbability and impossibility, considered as articles of *circumstantial evidence*, in the present book. It appeared to him, however, on perusing the manuscript, that the mode in which Mr. Bentham had treated the subject did not admit of any such separation of it into two parts, as he had at first contemplated. The only question, therefore, which remained, was, whether to place the chapter under the head of Theoretic Grounds, or under that of Circumstantial Evidence? and, on consideration, he has thought it better to postpone the more general and explanatory matter to the present book, than to separate this one species of circumstantial evidence from the rest.—*Editor.*

very extensive, modification of circumstantial evidence.

The occasion on which they are employed,—the occasion, at least, on which, under the present head, I shall consider them as employed,—is this:—on one side, a fact is deposed to by a witness; on the other side, the truth of it is denied: denied, not on the ground of any specific cause of untrustworthiness on the part of the witness, but because the fact is in its own nature *impossible*: impossible, or (what in practice comes to the same thing) too improbable to be believed on the strength of such testimony as is adduced in proof of it.

What is the nature and probative force of this modification of circumstantial evidence? Is there any, and what, criterion, by which impossible facts, or facts which are to such a degree improbable, as to be, for practical purposes, equivalent to impossible ones, may be distinguished from all others?

If any such criterion existed, its use in judicature would be great indeed. By the help of it, a list of such impossible and quasi-impossible facts might in that case be made out: made out by the legislator, and put into the hands of the judge. To know whether the probative force of the testimony in question were or were not destroyed by this modification of circumstantial disprobative evidence, the judge would have nothing more to do than to look into the list, and see whether the species of fact in question were to be found in it.

Unfortunately, there exists no such criterion: no *possibility* (if the word may here be employed without self-contradiction) of making up

any such list. Not only would one man's list contain articles which another man would not admit into his; but the same article which would be found in one man's list of impossibilities, would be found in another man's list of certainties.

From a man who sets out with this observation, no such list, nor any attempt to form one, can of course be expected. Yet, on the following questions, some light, however faint, may be, and will here be endeavoured to be, reflected.

1. What it is men mean, when they speak of a fact as being impossible — intrinsically impossible?

2. To what causes it is owing that one man's list of impossible facts will be so different from another's?

3. Different modifications of impossibility: different classes of facts which men in general, well-informed men in general, may be expected to concur in regarding as impossible.

4. Among facts likely to be, in general, considered as impossible, what classes are of a nature to be adduced in evidence?

When, upon consideration given to a supposed matter of fact, a man, feeling in himself a persuasion of its non-existence, comes to give expression to that persuasion; he pronounces the matter of fact, according to the strength of such his persuasion, either more or less *improbable*, or *impossible*.

In and by the form of words thus employed for giving expression to that which is in truth nothing more than a psychological matter of fact, the scene of which lies in, and is confined

to, his own breast,—a sort of quality is thus ascribed to the external phenomenon, or supposed phenomenon, viz. the matter of fact or supposed matter of fact itself. Upon examination, this quality, it will be seen, is purely a fictitious one, a mere figment of the imagination; and neither improbability and impossibility on the one hand, nor their opposites, probability and certainty, on the other, have any real place in the nature of the things themselves.*

* While the opposite and corresponding attributives, probability and improbability, have thus been applied to the supposed matter of fact; another pair of opposite and similarly corresponding attributives, viz. *credible* and *incredible*, have been applied, not only to the fact, but to the witnesses; not only to the supposed matter of fact itself, but to the persons by whose testimony the existence of it has been asserted.

In the structure of these two epithets, an undeniable impropriety is observable. By the termination *ible* (in Latin *ibile* and *ibilis*), potentiality and its opposite are the only qualities which, on other occasions, are denoted: on this occasion, instead of that of potentiality and its opposite, the import which they are employed to convey is that of *propriety* or *fitness*, *impropriety* or *unfitness*.

As to *potentiality*, or say *capacity*,—no imaginable matter of fact, how unfit soever to be credited, but what is credible; no matter of fact that is incredible. No supposed matter of fact more unfit to be credited than many a one which is actually, and by immense multitudes, firmly credited: and, as to witnesses, there never has been, nor ever can be, any one, not in a state of absolute insanity, who has not been not only credited, but properly and fully credited.

In connexion with, but rather in opposition to than in conjunction with, credibility and incredibility,—lawyers, in speaking of a proposed witness, employ the attributives *competency* and *incompetency*, speaking of the witness as being *competent* or *incompetent*. Of these words the use is, to form a sort of disguise for the question, whether the per-

So far as concerns probability and improbability, the fictitiousness of this group of quali-

son produced in the character of a witness shall be admitted as such, or excluded : for the same individual, of whom they will not say that in that character he is incredible, shall be excluded by them under the notion of his being incompetent. By the ambiguity in which they either found the epithets *competent* and *incompetent* involved, or contrived to involve them, these epithets became not ill fitted for their purposes. Incompetent, on every given occasion, was by each man deemed synonymous to *incredible*, or to *inadmissible*, according to the purpose which he had to serve. If to inadmissible, it was on this ground, viz. that, being by the supposition unfit to be believed, and in that sense *incredible*, it would by consequence be useless and dangerous to give him admittance, since in that case it might happen to him to be, in the other sense, so far from being incredible as to be actually credited.

All this while, in the words *trustworthy* and *untrustworthy*, the language possessed a pair of appellatives, by which (if employed instead of the words *credible* and *incredible* on the one hand, *competent* and *incompetent* on the other) the purposes of common sense and common honesty would have been fully answered.

In trustworthiness and untrustworthiness, there is no such impropriety as that which, in the instance of credibility and incredibility, has just been brought to view : and in regard to admission, had the word trustworthiness been employed, an idea that might have presented itself to an unsophisticated mind was, that it was a quality the existence or non-existence of which was a point rather to be *tried* afterwards, by means of *admission*, than to be determined without trial, for the purpose of forming a pretence for non-admission.

But, by the same qualities by which these terms were, in so superior a degree, adapted to the purposes of truth and justice, they were rendered unfit for the purposes of lawyers.

In the word *untrustworthy* they would have found but one sense : in the word *incompetent* they had the good fortune to find, or the dexterity to make, two senses, one of which served as a pretence, or a sort of reason, for the other. Assuming the man to be unfit to be credited if heard, they assumed, as if it were the same thing, rather than a consequence of the other, that he was unfit to be heard.

ties will scarcely, when once suggested, appear exposed to doubt.

Take any supposed past matter of fact whatever, giving to it its situation in respect of place and time. At the time in question, in the place in question, either it had existence, or it had not: there is no medium. Between existence and non-existence there is no medium, no other alternative. By probability, by improbability, by each of these a medium is supposed; an indefinite number of alternatives is supposed.

At the same time, the same matter of fact which to one man is probable, or (if such be his confidence) certain, is to another man improbable, or, if such be his confidence, impossible.

Often and often, even to one and the same man, at different times, all this group of fictitious and mutually incompatible qualities have manifested themselves.

To the profession the occasion was in its day an occasion of great interest, and is to this day had in general remembrance, in which the two words *credible* and *competent*, as applied to witnesses, served as cestuses to Lord Mansfield and Lord Camden; who might be termed the Cribb and Molyneux of Westminster Hall, but for the undissembled rancour by which the warfare of the psychological was distinguished from that of the physical combatants.

In regard to trustworthiness, how the matter stands in universal experience has been already stated. Every man is in general habituated to the language of truth, and on every occasion disposed to employ it; but on every occasion liable to be induced, by particular interest acting in a sinister direction, to substitute to it the language of falsehood.

But, according to the theory of these habitual and licensed utterers of falsehood, mankind are divided into two parcels; one of these never using any other language than that of falsehood, nor ever failing of causing it to be accepted as if it were the language of truth.

If his persuasion be felt to be of such a strength, that no circumstance capable of being added to the supposed matter of fact could, in his view of the matter, make any addition to that strength ; or if, on looking round for other conceivable matters of fact, he fails of finding any one, in relation to which his persuasion of its non-existence could be more intense ; *impossible* is the epithet he attaches to the supposed matter of fact—impossibility is the quality which he ascribes to it.

If, on the other hand, a circumstance presents itself, by which, in his view of the matter, an addition might be made to the intensity of such disaffirmative persuasion ; or if the supposed matter of fact presents itself as one in relation to which this persuasion of its non-existence might be more intense ; in such case, not *impossible*, but *improbable*, is the epithet,—not *impossibility*, but *improbability*, is the quality ascribed.

Certainty, which is the opposite to impossibility, or rather of which impossibility is the opposite, is applied to the persuasion, and from thence to the supposed matter of fact. It is not, any more than impossibility, applied or applicable to testimony.

As certainty, so uncertainty, applies itself to the persuasion and the fact, and not to the testimony. In the scale of persuasion, it embraces all degrees except the two extremes. The existence of a fact is not matter of uncertainty to me, if the fact be regarded by me as impossible.

Certainty, therefore, has for its opposite, *uncertainty* in one way, *impossibility* in another. Uncertainty, in the language of logicians, is its

contradictory opposite; impossibility, its contrary opposite.

The fiction by which (in considering the strength of a man's *persuasion* in relation to this or that fact, and the probative force of any other matter of fact when viewed in the character of an evidentiary fact in relation to it) occasion is taken to ascribe a correspondent quality, indicated by some such words as *certainty* and *probability*, to the principal fact itself,—appears to be, like so many other figments, among the offspring of the affections and passions incident to human nature. It is among the contrivances a man employs to force other men to entertain, or appear to entertain, a persuasion which he himself entertains or appears to entertain, and to make a pretence or apparent justification for the pain which he would find a pleasure in inflicting on those on whom a force so applied should have failed to be productive of such its intended effect.

Were it once to be allowed, that, as applied to the facts themselves which are in question, probability and certainty are mere fictions and modes of speaking; that all of which, on any such occasion, a man can be assured, is his own persuasion in relation to it; that that persuasion will have had for its cause some article or articles of evidence, direct or circumstantial, real or personal, and will be the result of, and in its degree and magnitude proportioned to, the probative force of that evidence; that, of such evidence, neither the probative force, nor consequently the strength of his persuasion, are at his command; that it is not in the power of any article of evidence to have acted with any degree of probative force upon, nor con-

sequently to have given existence to any persuasion in, a mind to which it has not been applied; and that therefore it is not in the power of any evidence to give either certainty or probability to any matter of fact; (the matter of fact being, at the time in question, either in existence or not in existence, and neither the evidence nor the persuasion being capable of making any the slightest change in it); that it depends in a considerable degree upon the mental constitutions of A and B respectively, what sort of persuasion, if any, shall be produced in their minds by the application of any given article of evidence; and that it is no more in the power of evidence applied to the mind of A, and not to that of B, to produce in the mind of B a persuasion of any kind, than it is in the power of evidence applied to the mind of B, and not of A, to produce a persuasion on the mind of A;—were all this to be duly considered and allowed, neither the existence nor the non-existence of a persuasion concerning a matter of fact of any sort, would have the effect of presenting to any person any other person as a proper object of punishment, or so much as resentment.

But the certainty of this or that fact is assumed as perfect and indisputable: and thus he of whom it is conceived that he fails of regarding, or of representing himself as regarding, that same fact in such its true light, is on no better foundation considered and treated as being either mendacious, or perverse and obstinate: perverse and obstinate, if he fails of regarding it in that light; mendacious, if, it being impossible to him to fail of regarding it in that light, he speaks of himself as if he did not.

When a man is himself persuaded,—or though he does but, under the impulse of some interest by which he is actuated, appear to be, or profess to be, persuaded,—of the existence of a fact; it is matter of pain and vexation to him to suppose that this same persuasion fails of being entertained, still more to observe that it is professed not to be entertained, by those with whom, on the occasion of it, he has to deal.

Hence it is that, in his mind and in his discourse, to entertain it is made matter of merit, to fail to entertain it, matter of demerit and blame, on the part of others with whom he has to do: and, to cause them to pursue that supposed meritorious line of conduct, the power of reward, if within his reach, is employed; and to deter them from the opposite conduct, even the power of punishment: of both which powers, in the application thus made of them, mankind have been unhappily accustomed to see and to feel the exercise, carried to a pitch so repugnant to the dictates of humanity and reason.

SECT. II. — *Impossible facts distinguished from verbal contradictions.*

It having been shewn that improbability and impossibility, applied to a matter of fact, are merely terms expressing a certain strength of persuasion of the non-existence of that fact; what remains is to shew, what are the grounds, on which such a persuasion is liable to be entertained: to shew, in other words, in what consists the improbability or impossibility of any alleged fact.

Previously, however, to entering upon this

inquiry, it will be necessary to discard out of the list of impossible facts, articles that might be in danger of being considered as included in it. These are:—

I. Contradictions in terms: or, as they might be termed, verbal impossibilities. Examples: Two and two are not so many as four:—Two and two are more than four:—The same thing is, and is not, at the same time.

The truth is, that in these cases no matter of fact at all is asserted; consequently none of which it can be said that it is impossible.*

2. Inconceivable facts. Sometimes to this class, sometimes to the former, belong the opposites of a variety of propositions of a mathematical nature: *e.g.* that two and two should be either more or less than equal to four: that two right lines should of themselves enclose a space.†

* This may be illustrated by the following passage from Locke: “All propositions, wherein two abstract terms are affirmed one of another, are barely about the signification of sounds. For since no abstract idea can be the same with any other but itself, when its abstract name is affirmed of any other term, it can signify no more but this, that it may or ought to be called by that name; or that these two names signify the same idea. Thus, should any one say, *that parsimony is frugality*, that *gratitude is justice*; that this or that action is, or is not, *temperance*; however specious these and the like propositions may at first sight seem, yet when we come to press them, and examine nicely what they contain, we shall find that it all amounts to nothing, but the signification of those terms.”—*Essay concerning Human Understanding*, book iv. ch. i. § 12.—*Editor*.

† These propositions, even such an one as the last, viz. that two right lines cannot enclose a space, are but verbal contradictions. The terms *straight line*, and *space*, and *enclose*, are all general terms, and to affirm them one of another, is merely to say that they are of this or that meaning. It is

SECT. III. — *No facts universally recognized to be incredible.*

BEFORE I enter upon the topic announced by the word *incredibility*, a topic the consideration of which does really belong to the subject of judicial evidence, it may be of use to clear the inquiry of a topic that does not belong to it, viz. *impossibility*. On the former, it will be at all times in the power of a reasonable man, in the station of a judge, to form a persuasion sufficient for his guidance: on the other, it will not be in the power of a reasonable man, in that station, to form a persuasion sufficient for his guidance in the business of judicature: and, of the introduction of the topic in argument, nothing but perplexity and illusion can be the result.

merely to say that the meaning we ascribe to the term space, or rather to the term enclosure of space, is inconsistent with the meaning we ascribe to the term two straight lines. When we pass from names to things, and take two straight rods in our hands, we have the evidence of our senses, that they cannot enclose a space. If they touch at any one part, they diverge from one another at every other part. If they touch at more than one part, they coincide, and then are equivalent to one straight line. What we mean by an enclosure, is such a line, or continuance of lines, that a body departing from any one point can pass on without turning back till it come to that point again, without having met in its progress any place where the line was interrupted, any place where there was not a portion of line. An enclosure is a line or conjunction of lines, which beginning at one point is continued till it comes to that point again. Two straight lines are lines which departing from one point never meet, but continually diverge. What is affirmed, then, is, that lines which do meet, in the manner thus described, and lines which in that manner do not meet, are not the same lines. The question, then, either is about the physical fact, the rods, to which the evidence of sense and experience is applicable; or it is about the meaning of general terms.—*Editor.*

In truth, the degree of incredibility that can with propriety be the subject of consideration for any purpose of judicature, is merely relative and comparative. The object of comparison is the probative force of the evidence by which the existence of the fact considered as improbable is indicated: and the question is, which of the two forces ought to be deemed the greater? — the probative force of the testimony by which the existence of the fact in question is indicated? or the disprobative force designated or pointed to by the word *incredibility*, as employed to express an attribute of the fact? Let the disprobative force of the incredibility be but ever so little greater than the probative force of the testimony by which the existence of the fact is maintained, it is sufficient for the purpose of judicature: the question concerning any superior degree, is purely speculative, not applicable to judicial practice, and, as such, irrelevant to the business of judicature, to the question (whatever it be) before the court.

In a loose and popular sense, nothing can be more frequent than the use of the word *impossible*, and its conjugate *impossibility*: frequent, and (such is the exigency of language), we may venture to say, *necessary*. But, if applied to the subject of judicial evidence, to express an idea distinct from, and (if one may so say) superior to, that of improbability—a high degree of improbability,—it then becomes productive of the confusion above spoken of.

The impropriety of introducing the word in this strict sense, on a judicial occasion (not to speak of other occasions), may be rendered apparent by this consideration, viz. that in the

use of it in this sense is involved the assumption of omniscience and infallibility on the part of him who uses it.*

Examples lending an apparent countenance to the use of it in this strict sense, may, I am aware, not be altogether wanting: but, upon a closer inspection, it will appear, that the objects in question either do not come at all under the notion of facts, or at any rate not under the notion of such facts as are capable of being made the subject of evidence.

* In the uncertainty thus confessed, there is nothing that applies, with any peculiar force, to this modification of circumstantial evidence. In the case of affirmative evidence (*i.e.* where the object of the evidence in question is to establish the *existence*, instead of the non-existence, of the fact to which it applies), if we were to look for a mark by which to distinguish, on each occasion, such lots as may, with confidence, be given for *conclusive*, our endeavours would be equally unavailing. If, where the object is to frame a description of the cases in which the non-existence of one fact may, without danger of error, and by rules not exposed to contestation, be deduced from the existence of another; the cases in which the existence of one may be deduced with equal assurance and success from the existence of another fact, will not be found to stand upon ground in any degree more satisfactory. Evidence is the ground we have for the truth of the propositions of which we are least assured: evidence, and nothing better, is the ground we have for those facts, of the existence or non-existence of which we take upon us to speak with the greatest confidence. What there is of reality in the ideas expressed by such words as *impossibility*, *necessity*, *certainty*, is, as already observed, not any property in the things, in the facts themselves, but only the degree of persuasion by which the opinions we entertain in relation to those facts is accompanied. He who, by the use of any of these expressions of confidence, should think to attach any additional strength to the grounds of persuasion, or any additional security for universality of assent, would be the man to answer the question put in Scripture—"Which of you all, by taking thought, can add a cubit to his stature?"

Take the following examples :—

1. It is impossible for the same thing to be, and not to be. The negative or opposite of this, it may be said, is a fact, the incredibility of which will be recognised by every body. And so with the two following :—

2. Where there is no property, there is no injustice.

3. Two and two make four.

Answer.—In the first case, no *fact*, properly speaking, is concerned. In that case we have a proposition; but it has not any fact for the subject of it. Examined closely, it will be found to be no more than a proposition concerning the signification of words. So vague and so inapplicable to any useful purpose is the import it conveys, that it is difficult to say what it does amount to : perhaps an observation relative to the use of the word *not*; shewing an occasion on which it cannot with propriety be employed.

No fact at all being indicated by the proposition in question, no fact is indicated by it capable of forming a subject of controversy in a court of justice.

2. The second supposed example is brought to view on account of the deserved celebrity of the author, and as an instance to shew how idle and nugatory may be the language of the acutest mind, when dealing with propositions of an extensive import, without having as yet scrutinised into their contents, and applied them to particulars.

Howsoever it may be with the preceding proposition, this one may readily be seen to be neither more nor less than a proposition con-

cerning the import of words. Where you cannot, in the way in question, employ the word *property*, neither can you, in the way in question, employ the word *injustice*.*

* So unfortunate is this great genius in his choice of this proposition, by which, in his conception, such great things may be done, that, even in the character of a proposition concerning the words in question, it is far from being uniformly true. If, by a report, true or false, I injure you in your reputation, is there no injustice in that case? Is it unconformable to the usage of language to say, I thereby do you an *injustice*? Yet, what property of yours is concerned in it, or affected by it? Will it be said, the property you have in your reputation? In this sense, the use of the word *property* is manifestly improper and figurative. Property is a thing that can be transferred: is reputation transferable?

Truth being generally desirable; demonstration being a means of coming at it with the greatest certainty; moral science being a department of knowledge in which the importance of truth is at the highest pitch; Locke wished to find, and thought he had found, moral truths to be a subject for demonstration. All moral truths, he thought, were capable of being demonstrated, by a chain of logical or rather dialectical propositions, of which this proposition constituted the first link.

Moral truths a subject for logical demonstration! As well might he have predicated the same thing of medical truths. As little could be done by this wonder-working proposition for moral science as for medical. The one, as well as the other, is founded on facts; on facts made known by observation, experience, and experiment. In both cases these facts are human feelings: in the case of medical science, the feelings more particularly of the body; in the case of moral science, more particularly the feelings of the mind. Of moral science, the only true and useful foundations are propositions enuntiative, not, like that of Locke, of the import of words, but of facts; viz. of the existence of human feelings, pains, or pleasures, as the effects of this or that disposition of law, or of this or that state of human affairs calling for a correspondent disposition and exercise of the power of the law. Of these, under the name of axioms of mental pathology, a specimen, nor that a scanty one, has been given in another place. (See Dumont, "Traité de Législation.")

3. That the proposition, two and two make four, is neither more nor less than a proposition concerning the import of words, seems evident enough, as soon as intimated. To these same apples to which when taken together I apply the numeral word four,—to these same bodies, when divided into two parcels equal in number, I apply respectively the numeral words two and two; and in both cases with equal propriety, and conformity to the usage of language. In this, then, we have another instance of a proposition not enuntiative of any fact,—of any fact having for its subject-matter any thing, other than the occasion on which the words in question have been wont, in the language in question, to be employed.

In this example, then, we do not see any exception to the general proposition in question; viz. the proposition, that, of facts liable to be the subject of judicial controversy, there is no assignable one which all men would be sure to be agreed in speaking of as incredible:—and this for the three following reasons:—

1. The proposition in question—two and two make four—is not, properly speaking, the enuntiation of a matter of fact, only of a manner of employing words.

2. If that, which it is an enuntiation of, *were*, properly speaking, a matter of fact; it would not be of the number of those facts which are liable to be the subject of judicial controversy or exhibition.

3. Although it were a fact, and liable to be the subject of judicial controversy or exhibition, there would be no assurance that all men would be agreed in speaking of the existence

of it as certain, or the negation of it as incredible.

Did any such thing exist as a catalogue of universally-acknowledged impossible, or even incredible facts, and these facts liable to be brought to view in judicature; the facts being arranged in alphabetical order, open the dictionary, the cause is at end.

Unfortunately, so far from a collection of such facts, whether any one such fact be to be found, is more than I would venture willingly to determine; and if forced to answer, my answer, I suspect, would rather be in the negative.

If, among physical facts, there should be one that presented a fairer chance than another of being allowed to occupy a place in such a catalogue, it should, I think, be this, viz. the existence of any body in two distinct places at the same time. But this, which, by the greater part of mankind, would (I suppose) be admitted into the catalogue of incredible facts, is, by one portion of mankind, nor that an inconsiderable one, held not to be incredible without one exception: and in the case to which that exception extends, it is held to be not simply not incredible, but certain and indisputable. Far be it from me to mention this deviation from the more common opinion, as matter of reproach to the deviators: I mention it only in proof of the discrepancy, perhaps the incurable discrepancy, of opinion, that prevails among mankind; and as one out of so many other considerations which concur in impressing the impropriety of precipitate exclusions and conclusions on the mind of an upright and zealous judge. As to

the exception in question ; whether, in point of truth, it be warranted or no, it belongs not to the present subject to inquire. Fortunately, supposing it unwarranted, — so long as the proposition, how paradoxical soever, confines itself to the highly extraordinary case to which alone it seems to have ever hitherto been applied, — no error, if it be one, can be more innocent to every purpose of judicature.

As there is nothing whatever (supposing it possible) that men cannot be made to do ; so there is no fact whatever that men may not be made to speak of as certain or as incredible, — no proposition which they may not be made to speak of as certainly true or certainly false, — by interest, real or imagined : by hope of pleasure, or fear of pain, from a source conceived (rightly or erroneously) to exist. In the particular case in question (two and two make four) — this subjection of discourse (as of all other modifications of human agency) to interest, this consequent versatility and ununiformity of discourse, has not, perhaps, been exemplified. But, in an example that stands next to it, the exemplification has actually and notoriously taken place. That two and two make four, has, perhaps, never been denied. But that one and one and one make three, has been denied. That in its application to most subjects it has been generally spoken of as true, is evident enough ; otherwise, the known usage of language, and the known import of the word *three*, could not have obtained. But, that there is a subject in relation to which this agreement does not obtain, is, in many countries, matter of equal

notoriety. Agreed, as applied to apples; agreed, as applied to men; not agreed, as applied to Gods.

I mention it, not as meaning to take a part in such a controversy; I mention it only as a striking proof, as well as illustration, that there is no fact whatever, real or nominal, that is out of the reach of controversy:—a proposition which, to the present purpose, has already been shewn to be of no small practical importance.

In vain would it be to say, that the exception here is in language merely, not in persuasion. As a general proposition, it is but too true, that persuasion and language are but too often at variance; but in the instance of no one individual person would I take upon me to affirm, but upon special grounds, that any such variance had place in this particular case. Granting, however, that, on the present occasion, persuasion were not conformable to language; what would it signify to the present purpose? It is in language, and in language only, that the catalogue in question, the supposed catalogue of facts universally agreed to be incredible, would be expressed.

By these same considerations it may be rendered equally apparent, that if, at any given moment, an article were in existence fit for entering into the composition of such a catalogue, the next moment might at any time expunge the article, and leave the catalogue a blank. Neither over internal persuasion, nor over exterior discourse, is the power of interest less at one time than another. To-day, men are agreed, that, to the truth of the proposition “one and one and one are equal to three,”

there is but this one exception. Let human laws, or opinion of divine command, or any other efficient cause of interest, experience an appropriate change, there shall be no exception at all, or any number of exceptions. And so in regard to the proposition, two and two make four, or any other proposition of grammar, mathematics, or physics.

Under the influence of interest, so far is what may be termed the *natural* incredibility of a fact from excluding it from a place in the catalogue of credible facts, and *vice versâ*, that its tendency may be, and seems to be, to provide it with a place in that same catalogue, and a place even in the class of *certain* facts. For, let the expectation of reward be annexed to the practice of regarding or speaking of facts naturally incredible as if they were certain, and let this reward be to be obtained pure, earned without sacrifice in the shape of reputation, or any other shape, what should hinder it from being embraced? *Credo quia impossibile est*, is the often-mentioned and natural result of the determination generated, and enthusiasm lighted up, by prospects of this kind. For at what cheaper rate can the matter of reward be earned in any shape? And so of punishment: a principle of action, the force of which, when applied in adequate quantity, is, in its operation, still more certain and irresistible.

What the influence may be (beneficial or otherwise) of the matter of reward or punishment so applied, to the interests of morality, knowledge, or social harmony, belongs not to the present place. When, of the above-mentioned proposition, which does belong to the

present place, the truth is established, the inquiry is at an end.

SECT. IV. — *Improbability and impossibility resolvable into disconformity to the established course of nature.*

AN incredible fact, as contradistinguished from a verbal contradiction (whether improbable or impossible be the epithet by which the particular strength of the belief in its non-existence is designated), owes its incredibility to one cause, and to one cause only.

This cause admits of a variety of appellations. On the part of the matter of fact deposited to by the affirmative evidence, disconformity (as supposed) to the established course*

* In ordinary language, the phrase would be, disconformity to some one or more of the *laws* of nature.

The expression *law of nature* is figurative, metaphorical: it is a metaphor taken from the use given to the same word *law* in the case of a political law: it is to that source, consequently, that we must resort for an explanation of it.

When a political law, the expression of an act of human will, is issued, that law emanating from recognised authority, and backed with the usual sanctions; a correspondent degree of conformity in human actions,—in the conduct of such individuals as are subject to the law,—is the customary and manifest consequence: and (human actions being events) a law, a political law, is thus a cause of conformity among events.

In regard to events of a physical nature, the grand and constant object of curiosity and inquiry, is that which respects the *cause*: and on a subject so interesting, when men cannot come at facts, rather than have nothing, they are eager to catch at, and content themselves with, words. Between this and that group of facts, a certain conformity is observed: what is the cause of that conformity, becomes then the question. Cause of the conformity?—none at all: the conformity is itself nothing: it is nothing but a word expressive of the

of nature : thus may be expressed what seems to be the most apposite and clearest designation, of which, in any such small number of words, it is susceptible.

From the course of nature at large, that of the mental part of man's nature requires to be distinguished ; hence disconformity in a *physical* respect, and disconformity in a *psychological* respect.

state our minds are put into by the contemplation of those facts. There are the facts : they do exist : but the conformity, as taken for a fact distinct from the facts themselves, has no existence.

Like so many other truths, this, being no more than a confession of ignorance, and that invincible ignorance, is not satisfactory to the human mind. Nothing but words being on this occasion to be had,—words, the counterfeit representatives of facts ; then men are determined to have, rather than have nothing. The conformity being (like every other fact, real or supposed) susceptible of the denomination of an effect, this proves the existence of a cause : what name, then, shall be given to that cause ? What name ?—what word ?—for when men have got words, they have got that with which (on this, as on so many other occasions) they are content to pay themselves. What cause ?—A *law of nature*. Here are events : these events are conformable to one another : here we have conformity amongst events. But, for that sort of thing which is a cause of conformity among events, we have a known name already : it is a *law*. The sort of events, the conformity among which this term hath been hitherto employed to designate, are human actions. The sort of events of which we are now looking out for the cause, are not human actions, but natural events. Law in this sense must, therefore, have something to distinguish it from law in that sense. In that sense it is termed *law* simply, without an adjunct : to distinguish this from that, let us give the word law an adjunct, and say *law of nature*.

If it were fully understood, that a *law of nature* signifies not an occult cause of conformity among facts, but merely the conformity itself ; the phrase might be employed in this sense without danger of confusion.

The remarks which follow, will, in the first instance, refer more particularly to physical, as contradistinguished from psychological facts. But they will, for the most part, be found applicable equally to both.

As it is only from evidence, coming under one or other of the descriptions already brought to view, that any notion whatever concerning the established course of nature can be derived; and consequently any notion concerning what is conformable to that course; so neither from any other source can any notion be derived respecting the disconformity of any supposed matter of fact to that same course.

The evidence thus characterised will, therefore, be composed of an indeterminate and indefinite multitude of matters of fact, drawn from all the evidence of every description that, to the mind of the person in question, (viz. the judge,) have happened to present themselves during the whole course of his life; and composed of all such facts as present themselves to him as bearing the sort of relation in question, to the matter of fact in question.

To produce disbelief of the existence of the matter of fact in question, this disconformity must be such as (in his judgment) to render its existence *incompatible* with a certain portion, at least, of those other numberless matters of fact, of the existence of which he has been persuaded by the indeterminate but ample mass of evidence above indicated.

When the improbability (that is, the apparent, the relative, improbability) of an alleged fact, is set in the balance against testimony, it is still at bottom little more than testimony

against testimony. Of the facts of the existence of which a man is persuaded, the knowledge, the persuasion, is derived partly from his own perceptions, partly from the alleged perceptions of others. But, in the unmeasurable mass of facts which (at least in a country where civilisation is tolerably diffused) the most ignorant man is said to *know*, the number of those of which his knowledge is derived from his own immediate perceptions, from his own individual experience, is small, in comparison of those, for the knowledge or supposed knowledge of which, he stands indebted to the experience or supposed experience of others.

Concerning individual facts, — so far as mere perception, exclusively of inference drawn from perception by judgment, is concerned, — no force of exterior evidence can either increase or diminish the degree of persuasion of which such perceptions cannot but have been productive. But in regard to *species* of facts, there is not one, perhaps, concerning which the persuasion derived by a man from his own experience, would not be capable of being overborne by allegations of contrary experience on the part of other men. What makes our confidence so entire as it is in regard to the existence of those species or classes of individual facts, the existence of which is announced by the phrase which exhibits as the cause of it this or that law of nature, is, — that, so often as it falls in his way to make the trial, a man finds his own perceptions in relation to them confirmed by the reputed perceptions of all other men without exception.

SECT. V.—*On the three modes of disconformity to the course of nature; viz. 1. Disconformity in toto. 2. Disconformity in degree. 3. Disconformity in specie.*

It has been seen that in all cases without exception, in which any matter of fact is supposed by any person to be incredible, the ground of the supposition is a supposed disconformity between this matter of fact, and what is by the person in question considered to be the established course of nature.

But this disconformity is of three kinds; and corresponding to these three kinds of disconformity are three classes, into which facts supposed to be incredible may be divided.

1. Facts disconformable *in toto*: facts which, supposing them true, would be violations of some manifest and generally recognized law of nature, *e. g.* a body at the same time in two different places.

2. Facts disconformable *in degree*: true, perhaps, in every day's experience, in certain degrees; false, in the degree in which, by the testimony in question, they are stated as being true: *e. g.* a man sixty feet high.

3. Facts disconformable *in specie*: facts altogether different from any which have ever been observed, but which, if true, would not be violations of any generally recognized law of nature: *e. g.* the unicorn.

It is manifest, that, in the two last of these classes, the incredibility of the fact rises only to a greater or less degree of improbability, not to that of impossibility. The supposed facts are not *repugnant* to the established course of na-

ture; they are only not conformable to it: they are facts which are not yet known to exist, but which, for aught we know, may exist; though, if true, they would belong to the class of extraordinary facts, and therefore require a greater degree of evidence to establish their truth than is necessary in the case of a fact exactly resembling the events which occur every day.*

Though facts of these two classes can never be properly said to be impossible, they may be improbable to a degree little short of practical impossibility.

I. Facts disconformable *in toto*: facts *repugnant* to the course of nature.

To give a complete list of facts impossible *in toto*, would be to give a complete list of those general observations which have been, or use to be, characterised by the appellation of laws (physical laws) of nature.

To give any such complete list, will, I suppose, be universally recognized as beyond the limits of human knowledge, in its present state: a complete system of physics might be considered as included in it.

By way of illustration, I will venture to propose a few articles as a specimen of what might be the contents of such a list.

Specimen of the laws of nature common to all matter, as far as hitherto known.

1. No two bodies can be in the same place at the same time (cases of penetration and inclusion not excepted.)

* It will be attempted to be shewn in a subsequent note, that even what Mr. Bentham calls impossibilities *in toto*, are in reality nothing more than facts in a high degree improbable.
—Editor.

2. No one body can be in two places at the same time.

3. All known bodies are, in proportion to their quantities of matter, affected by the law of gravitation.

4. All bodies are governed by the law of gravitation, except in so far as an exception to that law is created by any of the other known causes of motion or rest. In other words,

5. For each instant of time, the place of every body, of every particle of matter within the reach of our observation, is determined by the law of gravitation, modified by the other known *primum mobiles*, or causes of motion and rest. These seem to be as follows :

1. The centrifugal force.

2. The force of cohesion,—the attraction observed to take place amongst the homogeneous parts of the same whole.

3. The force of chemical attraction : to which, perhaps, may be to be added repulsion. The attraction (and repulsion) observed to take place amongst the contiguous heterogeneous parts of the same whole.

4. The force of repulsion or elasticity, given to the particles of other matter by caloric, when, being united with them, it forms a gas.

5. The force of expansion and contraction (repulsion and re-attraction) produced by the addition and subtraction of caloric to and from other bodies in the states of solidity and liquidity.

6. The force of electrical and galvanic attraction and repulsion.

7. The force of magnetic attraction and repulsion.

8. The force of muscular motion put in action by the will.

9. The force of muscular motion put in action by the vital power, in the case of the involuntary motions that take place in living animals.

10. The force of muscular motion put in action in the way of animal galvanism.

11. The force of vegetation.

Of these forces (setting aside the centrifugal force, the existence of which is rather matter of inference than observation) the influence of gravity is so much more extensive and powerful than the rest, that the observation expressive of its existence seems entitled to be distinguished by the appellation of the general or universal law of nature, applicable to all bodies of which we have any sort of cognizance: while the other laws of nature, as above brought to view, may be considered as constituting so many exceptive clauses, with reference to that general law. In most of these instances, the force is not perceptible but in the case where the distance between the particles concerned is extremely small: and accordingly, in few, if any, can it be clearly perceived to have place beyond the limits of the planet which we occupy.*

* Gravity, the species of attraction common to all perceptible matter, constitutes, as it were, the general law of nature: attractions inferior in force, or limited in extent—attraction of cohesion, of magnetism, of electricity, of galvanism, with the multitudinous system of chemical attractions, — constitute, as it were, so many exceptions to that general law of nature. The relation of a prodigy, will, if false, be traceable into the relation, the allegation, of a violation of some one or more of the known laws of nature. In most, if not all, the relations of

Taking this, for argument's sake, as a complete list of *primum mobiles* (and I am inclined to think it would not be found to be very far from a complete one), any motion which, being in a direction opposite to that of the attraction of gravitation, should not be referable to any one of those particular causes of motion, may be pronounced *impossible*: the existence of any such motion or any given body upon or near any part of the earth's surface, for and during any given space of time, an impossible fact.

A particular example may here help to explain the nature and probative force of *impossibility*,—physical impossibility, and that impossibility *in toto*,—as adduced in the character of an evidentiary fact disprobative of the sup-

this kind that have been current, so gross has been the deceit, that the law, or among the laws, stated as having been violated (*i. e.* superseded on that occasion by some being distinct from and paramount to the universe,) has been the general, the universal, law: the law of gravity itself. The other particular laws not having been in any degree known, at any period when relations of this sort obtained general credit among the superior and most enlightened classes, instances of any pretended violation of these more particular laws are scarce discernible. An instance of a needle of pure iron of a certain weight disobeying the magnet, or of a needle of pure gold of a certain weight* obeying it, would be in not less palpable repugnance to a known law of nature, than the ascent of an insulated and naked man into the region of the sky would be. But while the magnet or its characteristic properties remained unknown, false stories about magnets could not be broached.

* I say of a certain weight: for of late a notion has been advanced, and, for aught I can say to the contrary, proved, that most if not all bodies may be seen to pay obedience to the magnet, when reduced to a certain minute quantity.

posed fact, supposing the existence of it averred by direct testimony.

In one or more of the many books formerly current on the subject of witchcraft and apparitions, I remember reading the following, stated as a fact. In a room somewhat lofty, not by any muscular exertions either of his own or of any other person, other persons being however at the same time in the same room, a man finds himself gradually raised up to the height of the ceiling, and let down again; his body all the time not being in contact with any other, except those of which his apparel was composed.

This I would venture to give as a specimen of a sort of fact practically speaking impossible, viz. such an one as I could not be persuaded of the truth of, not only upon the testimony of any one single witness, but upon the testimony of any number of witnesses that ever found their aggregate testimony contradicted by other witnesses in any court of justice. The supposed fact, impossible?—why impossible? Because it is in repugnance to the law of gravity, and not in conformity to any of those particular laws which operate as so many exceptions to that general law. Be it so: it cannot be brought under any of these particular laws. But, supposing these to be the only particular laws, or say causes of motion, as yet known: can you take it upon you to pronounce it impossible there should be any others? The steam engine, as a source of power, is but a century and a half old: the knowledge of electricity, as to the great bulk of its effects, not so much as a century: galvanism, but of yesterday:—till the other day, there were but six primary planets moving round our

sun ; now there are eleven. Are new *primum mobiles* less possible than new planets ?

I answer:—as to the discovery of new causes of motion, causes apparently distinct from, and not referable to, any of those above enumerated, I am not disposed to regard it as in any degree improbable. Yet, as to any causes adequate to the production of any such effect as the effect in question ; in the discoveries just spoken of there is not any thing that would prevent me from regarding it as being, in the sense above determined, practically impossible. Why ? Because it appears to me practically impossible, that, after so long a course of physical experience and experiment, any *primum mobile*, of a force adequate to the production of an effect of such magnitude, can have remained undetected. As to the power of steam, the application of it to any useful purpose is not so old as a century and a half ; but the existence of it as a source of motion, could never have been altogether a secret to any one who ever boiled a pot with a cover to it.*

* It may, perhaps, be doubted, whether, until our knowledge shall have attained a perfection far beyond what it has attained, or is ever likely to attain, such an attribute as impossibility *in toto*, can, in the sense in which Mr. Bentham uses the words, be predicated of any conceivable phenomenon whatever.

Mr. Bentham has given a list (whether complete or incomplete is of no consequence for the present purpose) of the various forces by which gravitation is known to be, under certain circumstances, counteracted : and assuming this list to be complete, he proceeds to infer, that “ any motion which, being in a direction opposite to that of the attraction of gravitation, should not be referable to any one of those particular causes of motion, may be pronounced impossible :” and for practical purposes, no doubt it may ; but if metaphysical accuracy be sought for, I doubt whether even in this case the

II. Facts disconformable *in degree*.

Of facts impossible in degree, (meaning always

impossibility in question be any thing more than a very high degree of improbability. For,

1st. Suppose the catalogue of all the known forces which may operate to the production of motion, (or, as Mr. Bentham calls them, the *primum mobiles*,) to be at present complete: does it follow that it will always remain so? Is it possible to set limits to the discoveries which mankind are capable of making in the physical sciences? Are we justified in affirming that we are acquainted with all the moving forces which exist in nature? Before the discovery (for instance) of galvanism, it will be allowed, we should not have been justified in making any such assertion. In what respect are circumstances changed since that time? except that we are now acquainted with one force more than we were before. By what infallible mark are we to determine, when we have come to the knowledge of all the properties of matter?

Mr. Bentham himself acknowledges that the discovery of new moving forces is not impossible; but the discovery of new forces, adequate to the production of such an effect as that of raising a heavy body from the floor to the ceiling of a room without any perceptible cause, he does consider impossible; because (says he) had any force, adequate to the production of such an effect, been in existence, it must have been observed long ago.* No doubt, the improbability of the existence of any such force, increases in proportion to the magnitude of the effect; but it may be permitted to doubt, whether it ever becomes an impossibility. Had our grandfathers been told, that there existed a force in nature, which was capable of setting gold, silver, and almost all the other metals on fire, and causing them to burn with a bright blue, green, or purple flame, — of converting the earths into bright metallic substances by the extrication of a particular kind of air; &c. &c., — they surely might have said, with fully as

* In this instance, Mr. Bentham really breaks down the distinction between his impossibility *in toto*, and impossibility *in degree*. Causes may exist (says he) which are not yet known to us, adequate to the production of *some* effect; but not adequate to the production of *so great* an effect. If so, however, this impossible fact is impossible in degree only, and not *in toto*.

by impossible, such as would generally be accounted so), the exemplifications that might be

much justice as we can at present, that if any cause had existed in nature, adequate to the production of such remarkable effects, they could not have failed to have been aware of it before.

2dly. Suppose it certain that all the great moving forces, to one or more of which all the phenomena of the universe must be referable, were known to us; we should not, to any practical purpose, be farther advanced than before. We might indeed, in a general way, be assured of the impossibility of every phenomenon not referable to some one or more of these forces as its cause: but that any *given* alleged phenomenon is in this predicament, is more than we could possibly be assured of; until we knew not only all the moving forces which exist, but all the possible varieties of the operation of all those forces, and all the forms and shapes under which it is possible for them to manifest themselves; until, in short, we knew all which it is possible to know of the universe. How can I be sure that a given phenomenon which has no perceptible cause, is not the effect of electricity, unless I knew what all the effects of electricity are? And so of all the other laws of nature. As, however, it is very improbable that we ever shall know all the laws of nature in all their different combinations and manifestations, and as, moreover, it is difficult to see how, even if we did know them all, we could ever be certain that we did so; it seems that we never can pronounce, with perfect certainty, of any conceivable event, that it is impossible. See even Mr. Bentham himself, *infra*, sect. 9, *ad finem*.

Although, however, it could not be pronounced, of the story told by Mr. Bentham, that the event which it relates is impossible, thus much may with safety be pronounced, that, if it did happen, it was not produced by witchcraft. I can conceive the existence of sufficient evidence to convince me of the occurrence of the event, improbable though it be. I cannot conceive the existence of any evidence, which could convince me that witchcraft was the cause of it. The reason is this: suppose the fact proved, the question remains, — Is it referable to witchcraft, or to some natural cause? — Of extraordinary events, produced by natural causes, many have come within my experience: of events produced by witch-

given are innumerable. These consist in deviations from the ordinary quantities : deviations extending to such a degree, as on that account to be regarded as incredible.

Let us take those which regard the manner of being of the human species.

1. Extent of human stature.
2. Quantity of human force.
3. Duration of human life.
4. Duration of life without food.
5. Time of gestation.
6. Number of children at a birth.

Various are the grounds on which facts having, like the above, the human species for their sub-

craft, none whatever. That extraordinary events from natural causes have frequently occurred, there is abundant evidence : while there cannot, in the nature of things, be any evidence, that any event has ever been occasioned by witchcraft. There may be evidence that a particular event has uniformly followed the will of a particular person supposed to be a witch ; but that the supposed witch brought about the given effect, not by availing herself of the laws of nature, but through the agency of an evil spirit, counteracting those laws, — this can never be more than an inference : it is not in the nature of things that any person should have personal knowledge to that effect ; unless he has that perfect acquaintance with all the laws of nature, which alone can enable him to affirm with certainty that the given effect did not arise from any of those laws. What alleged witch, or magician, was ever suspected of producing more extraordinary effects than are daily produced by natural means, in our own times, by jugglers ? Omniscience alone, if witchcraft were possible, could enable any one not in the secret, to distinguish it from jugglery. It is no wonder, then, that no evidence can *prove* witchcraft ; since there *never can be* any evidence of it, good or bad, trustworthy or the reverse. All the evidence that has ever been adduced of witchcraft is, — testimony, in the first place, to an extraordinary event, and, in the next place, to somebody's *opinion* that this event was supernatural ; but to nothing else whatever. — *Ed.*

ject, present a claim to preference. Being more interesting than any others, they are more open to observation, and more likely to attract it: and they are wont, on a variety of occasions, some of them more than others, to come in question on judicial occasions: in particular, time of gestation, and duration of life without food; but, most of all, the former; legitimacy or illegitimacy depending upon it.

Of the six examples thus taken for the purpose of illustration, two admit of deviations at both sides; viz. extent of stature, and time of gestation. In the other cases, there is no room for deviation but on the side of increase: the minimum being in the ordinary course of nature.

In relation to facts objected to as incredible in consideration of the magnitude of the *degree* in which they deviate from the ordinary course of nature, erroneous judgment on the part of the judge seems rather more to be apprehended in disaffirmance of the supposed incredible facts, than in affirmance. Why? — Because, in most instances of facts, the credibility of which is liable to come in question in judicature, the judge (especially supposing him a man of a mind cultivated in a degree at all approaching to what befits a man in such a situation) will naturally be more or less apprised what is the ordinary course of nature: but, of the known deviations, of the degrees of deviation known by men possessed of appropriate information in the line in question, it may well happen to him to be very imperfectly, if at all, apprised. If, then, without having recourse to scientific evidence (viz. to such as applies in

particular to the species of fact in question), he takes upon him to decide in disaffirmance of the fact, error on his part may be but too naturally the consequence.

Take, for instance, the question,—Of what length of time passed without food, the patient surviving, may the existence be regarded as credible?

Anno 1753, at the Old Bailey, London, Elizabeth Canning was convicted of perjury. Of the mendacity of her testimony, the whole evidence taken together, I have not the smallest doubt. But one part of it consisted in an affirmation on her part of her having passed a certain length of time almost without food. In the course of the history of that cause, several persons, it appears, regarded the extraordinariness of this supposed fact as sufficient to render it incredible. This judgment I should not expect to find confirmed by the opinion of well-informed scientific witnesses. Why?—Because at different times I remember reading different accounts of the protraction of animal, and in particular human, life, without food, for much greater lengths of time : accounts that did not appear on the face of them to present any suspicious circumstances.

In the list of cases above exhibited, there are few (if any) in which it might not happen, in one way or other, to come into question in the course of judicature ; and this without having recourse to wagers, by means of which, if legalised, there is no sort of fact whatever that may not be made to call for the decision of a judge.

1. Duration of life. Titius nominee in a life-

annuity, or sends to put in a claim of property in a distant country. The age of Titius is 170, 160, 150. Parr is said to have passed his 151st year; Jenkins his 169th. But the judge either has never heard of the reputed age of Jenkins or of Parr, or disbelieves it. In some periodical print an article appeared some years ago, stating as still in existence a man who had passed the age of 180.

2. Duration of the time of gestation. This is a question of no very unfrequent occurrence, and (in respect of the legitimacy of children, and the honour of parents) of the utmost practical importance. There are well-attested instances of women whose pregnancy has continued ten, eleven, or even twelve, months. In the case of a pregnancy protracted for the term of ten months, a rash judge, too decided to suffer the exhibition of scientific evidence on this point, might do a cruel injustice.

3. Number of children at a birth. Of three children born at the same time of the same mother, the existence (suppose) has been put out of doubt by other evidence. Comes another person, claiming property on the ground of succession, and says, "My mother had four children at a birth, and I am one of them." "Four at a birth!" says the judge; "that I never can believe: three I can believe, for I have known instances of it. I will not hear your evidence." Five at a birth I remember reading of in newspapers, with individualisation of names, times, and places.

4. Number of children born of one woman. The like precipitation is capable of taking place in this case as in the last preceding one.

Between thirty and forty, I am clear that I have read of.

5. Duration of fecundity in women. Deliver some years after seventy, I think I have read of. An estate is claimed on behalf of a child, whose mother, it is alleged and confessed, when she was delivered of him, was turned of sixty. "No," says our rash judge: "the fact is impossible: it is needless to hear evidence."

But such rashness—such irrational refusal to hear evidence—is it to be supposed? Alas! the rashness here supposed as credible on the part of this or that individual judge, is nothing in comparison to the rashness which continues to be exemplified to this day, in the most enlightened countries, by the whole fraternity of judges.

In regard to facts devious in degree, it is impossible to fix upon any point of the scale, as being the point which separates the incredible degree from the credible. At a large distance above the ordinary or mean level, to a person determined to take the distance large enough, there will commonly be no difficulty. But begin with the most devious degree allowed to have been exemplified, propose the next degree, and then the next; scarce any man that will not find himself perplexed, and even in an inextricable degree, to say at what degree credibility ends, incredibility begins. 1. Stature. A man a hundred feet high, incredible. But nine feet? In London, nominal nine feet has been exhibited: to make allowance for exaggeration, say eight feet. But, eight feet being certain, shall eight feet and an inch be

incredible? The credibility of eight feet and an inch being admitted, add an inch more, and so on without end. 2. Force. No man living who is capable of lifting upon his shoulders a fat and full-grown ox of the largest breed; few men who would not have been able to deal in that same way by that same animal when just born. Take any man, and propose it to him, or to any one else, to say, at what age of the animal, or at what precise weight in pounds and ounces, the man's power of lifting him will cease. 3. Fecundity at a birth, or total. According to the legend, in consequence of the imprecation of a beggar woman, the Countess of Desmond had as many children as there are days in a year: whether at one or more births, I cannot take upon me to recollect. A delivery of five at a birth has been mentioned, with all the circumstances, within these few years, in the English journals. Taking this number for certain, will six be incredible? Thus we get on, one by one, till we come to the Countess of Desmond's number: only, the more there are of them, the smaller they must be.

A treatise on the deviations from the ordinary course of nature has been spoken of as a necessary part of an encyclopedical system, by Bacon. In the synoptical table prefixed to the first French Encyclopedia, the mention of it has been revived by D'Alembert. Of a treatise on this subject, the fundamental part would consist of a statement of the alleged facts. In regard to such facts as are more particularly apt to come in question in a court of judicature, — such, above all, on the belief or disbelief of which (as in some of the above examples) the

property and honour of families may depend ; might it not be of use that arrangements should be taken by governments for their authentication and registration ? At present, the credit of facts of this description rests, in general, on no firmer foundation than that of a paragraph in this or that periodical publication. And who can say but that it may sometimes happen that a false fact of this description shall have been inserted, in the view of its being, on an individual occasion, employed in evidence ? In the character of the best and only evidence which the nature of the case admits of, the paragraph may or may not be listened to by the judge. But,—though it should not be admitted in a direct way,—in an indirect and circuitous way it may, nevertheless, operate in the character of evidence. The judge will, at any rate, not refuse to hear scientific evidence. But the opinion of the witness is drawn (for from what better source can it be drawn ?) from this or that paragraph, which he has read in a newspaper, with or without the faculty of recollecting the source from whence he took it.

III. Facts disconformable *in specie*.

When, on a survey of the catalogue of incredible, or supposed incredible, facts, we come to the class of those which, if incredible, are so on this ground ; and when, accordingly, on this ground, we set about the task of drawing the line between the credible and the incredible ; we find ourselves on an ocean without a compass, and that ocean without bounds. By what consideration can any bounds be set to the modifications of matter ?—to the modifications that may have been exemplified in this place,

in that place, or in any place? Take any one of the species of men, spoken of as existing, by Pliny or Mandeville; who shall say but that, in some place or other, at some time or other, that species may have existed? Who shall say that in no place whatever, at no time whatever, the existence of such species would be other than absolutely incredible?

By anatomists, some of them, if examined, might perhaps be found to involve physiological incompatibilities; but such incompatibilities will not be unapt to be too hastily assumed. Angels are painted by adding goose's wings, devils by adding bat's wings, to an ordinarily-shaped human body. Judging from birds, an anatomist may pronounce the use of such an appendage incompatible with such a shape. Yes: supposing no greater quantity of muscular force capable of being exerted by a given quantity of matter than what is exerted by men or birds: but what will he say of fleas?

At this moment I have before me a copy of the book known to antiquaries by the name of the "Nuremberg Chronicle." This work contains, in a folio volume in the Latin language, the history and geography of the known world, printed in that city in the years 1492 and 1493; exhibited at the same time to the corporeal as well as to the mental eye, by a multitudinous series of graphical representations, taken from wooden plates. Amongst these are cuts of twenty-one devious species of men, or, as we should say, monstrosities, from Pliny and other authors.* Some of them appear to involve in-

* Fol. 12.

compatibilities of the anatomical kind, as above. Others have actually been exemplified: some nearly, some even strictly: the Cyclops eye; the horns; the redundant arms and hands. In these instances, however, the exemplification has not been known to extend beyond the individual. But species, are they any thing but individuals multiplied? In the case of the porcupine man, the deviation would naturally at first be thought confined to the individual; but it was found to extend to the race.

Gulliver, upon his return from Lilliput, consigned, as he tells us, to Greenwich Park some of the neat bulls and cows of that country. Till he read on to the account of this source of permanent real evidence, which converted his doubts into belief, I forget what bishop, mentioned by Swift and others, was induced to regard the whole history as a fable. At the Leverian Museum, full-grown neat cattle, much about that size, were to be seen in glass cases.

Among the Nuremberg-Chronicle men, are to be seen the cranes, with their classical enemies the pigmies, the prototypes of the Lilliputians. Is not the incredibility of the Lilliputians lessened, more or less, by the Leverian buffaloes? The *relative* incredibility, I think, beyond dispute. The relative incredibility; that is, our propensity to regard the existence of such a race in that light. But the absolute incredibility, the impossibility, — how can that be affected by the analogy in question, or any other? — the absolute incredibility, supposing any determinate idea to be capable of being found, to annex to the expression; a dis-

covery which, to my view, does not, I must confess, present itself as easy to make.

The fact being given; the incredibility of it, the relative incredibility, is lessened by remoteness in respect of place. The propensity to disbelieve is, certainly. By what cause?—The imagination would probably be found to bear a considerable part in the production of the effect; but neither is reason without her share. The more remote the country, the less explored. Had races of Cyclops, of horned men, of many-handed men, of pigmies, existed in England, could they have thus long remained undiscovered? So far as this consideration operates, the relative incredibility of these and other devious varieties of the human species would evidently be much less in the interior of New Holland, than in Old England.

Antecedently to the importation of the kangaroo, and the two species of ornithorynchi, suppose a paragraph in a newspaper, speaking of an animal of any one of those descriptions as found in a wood in England. The first propensity would have been to regard the statement as fabulous or incorrect: the next, to take for granted that the animal had been imported from some distant country, and had by accident got loose.

From remoteness in point of place, analogy conducts us naturally to remoteness in point of time. On this ground, imagination and reason act in opposite directions: the imagination, to diminish the incredibility (meaning always the relative); reason, to increase it. In time as in place, as the scene grows more and more remote, to the mind's eye it is more and more

obscure. Ghosts, devils, vampires, hobgoblins of all sorts, may exist in darkness ; in the light, we see clearly there are no such things.

Reason does not in this case diminish the incredibility, as in the former. When the first impulse given by the imagination is resisted, it seems difficult to say why, in the case of an alleged fact devious *in specie*, the incredibility of it should be lessened by this cause. As far back as history, supported by sources of permanent *real* evidence (skeletons, statues, sculptured portraits, drawings, pictures, or human works) goes, can any material difference be found between our predecessors and ourselves ?

On the other hand, so far as the incredibility of any devious fact depends upon the causes of untrustworthiness, the increase which it receives from remoteness in point of time is abundantly notorious. In the track of experience and civilization, the further back we go, the greater the proportion of incorrectness as well as mendacity, the greater the ratio of fable to history, till at last it is all pure fable. In distant times, histories melt at last into fables, as, in distant plains, hills do into clouds. It is with the infancy of the species, as with the infancy of the individual: dreams mix themselves with realities.

In effect, remote *times* are virtually present to us in remote *places*. The different generations of mankind, at their different stages of civilization, are at once present to our eyes. We may view our ancestors in our antipodes. In Japan, sorcerers are still seen riding in the clouds. In Negroland, witchcraft is even now the most common of all crimes. Half a century

is scarce past since Hungary has been cleared of vampires.

Yet, even in time as in place, experience forbids our regarding the present as cast in exactly the same mould with the remote. If New Holland has presented us with its kangaroos and ornithorynchi, Cuvier and others have presented us with their parallels in the extinct inhabitants of an antediluvian world.

In this line of investigation, as in others, errors concerning past times might, in a practical work like the present, pass unnoticed, if the application of them confined itself to past times. The misfortune is, that, when facts, mischievous as well as fabulous, have, under favour of the clouds of the morning, been planted in past times, they are apt to be transplanted into present, there to take root, and yield a poisonous increase. If Blackstone refuses a part of his credence (for it is but a part) to modern witches, it is because they are not old enough. A few years more over their head, and then his faith in them becomes entire. A little while, and the imagination of some successor or pupil of the departed sage may beget upon the ghost of the witch of Endor a succession of modern witches, and then comes the reign of terror again, if not of blood: for the conspicuous sufferings that have been produced by witchcraft at the foot of the fatal tree, or in the water, or in the fire, are as nothing in comparison of the horrors which it has planted in the pillow, and in the chair which, but for them, would have been an easy one. How much better directed has been the zeal of those enlightened divines, who, to conquer peace for

flesh and blood, (reflecting that the accident of being bound up with history does not give truth to fables,) have made war upon the sorceress, and devoted to annihilation that queen of terrors. Has not Farmer, in the same generous view, converted demoniacs into madmen? and did not Priestley, to the same end, and in a sense peculiar to himself, wrestle with the prince of darkness?

Nature makes her mock of those systems of tactics, which human industry presents as leading-strings to human weakness. In so far as difference *in specie* is constituted by difference in proportion, which is as much as to say difference *in degree*, this latter division of devious facts must be confessed to coincide with the former. The existence of pigmies and Lilliputians being incredible, is it so in the character of a fact devious *in specie*, or devious only in degree? Dwarfs are devious in degree only, and without difficulty. Why?—Because, the race being the same, the difference is, in the botanical sense, only a variety. But dwarfs, it is believed, may be found, not above four times the height of Lilliputians, and much less superior in height to pigmies than inferior to ordinary men.

At the worst, imperfect order is better than total chaos. Amidst so thick a darkness, the faintest light is not altogether without its use.

[*Further remarks by the Editor.*]

After an attentive consideration of the characters by which Mr. Bentham endeavours to distinguish his three classes from one another, the reader will probably join with me in reducing these three classes to two; viz. 1. facts

repugnant to the course of nature so far as known to us, and 2. facts merely *deviating* from it: or (to express the same meaning in more precise language) 1. facts *contrary* to experience; 2. facts *not conformable* to experience.

The discovery of a new species of animal, presents a specimen of a fact *not conformable* to experience. The discovery (were such a thing possible) of an animal belonging to any of the already known species, but unsusceptible of death, or decay, would be a fact *contrary* to experience.

This distinction was pointed out by Hume;* but, having pointed it out, he knew not how to apply it: and the misapplication which it seemed to me that he had made of it, led me for a long time to imagine that there was no foundation for the distinction itself. Having, however, by further reflection, satisfied myself of its reality, I will attempt, if possible, to make my conception of it intelligible to the reader.

All that our senses tell us of the universe, consists of certain *phenomena*, with their *sequences*. These sequences, that is to say, the different orders in which different phenomena succeed one another, have been discovered to be invariable. If they were not so; if, for example, that food, the reception of which into the stomach was yesterday followed by health, cheerfulness, and strength, were, if taken to-day, succeeded by weakness, disease, and death; the human race, it is evident, would have long ago become extinct. Those sequences, then, which are observed to recur

* See his Essay on Miracles.

constantly, compose what is termed the *order of nature*: and any one such sequence is, by rather an inappropriate metaphor, stiled a *law of nature*.

When a new discovery is made in the natural world, it may be either by the disruption of an old sequence, or by the discovery of a new one. It may be discovered, that the phenomenon A, which was imagined to be in all cases followed by the phenomenon B, is, in certain cases, not followed by it; or it may be discovered that the phenomenon C is followed by a phenomenon D, which, till now, was not known to follow it.

In the former case, the newly discovered fact is *contrary* to experience; in the latter case, it is merely *not conformable* to it. In the first case it is *repugnant* to what had been imagined to be the order of nature; in the second case, it merely *deviates* from it.

The first time that the sensitive plant was discovered, its characteristic property was a fact *not conformable* to experience. A new sequence was discovered; but no sequence was broken asunder; the plant had not been known to possess this property, but neither had it been known not to possess it, not having been known at all.

But if a stone projected into the air were, without any perceptible cause, to remain suspended, instead of falling to the ground; here would be not merely a new sequence, but the disruption of an old one: a phenomenon (projection of a stone into the air) which, from past experience, had been supposed to be universally followed by another phenomenon (the fall

of the stone), is found, in the case in question, not to be so followed. Here then is a fact *contrary* to experience.

The error, then, (as it appears to me) of Hume, did not consist in making the distinction between facts contrary, and facts not conformable, to experience; it consisted in imagining, that, although events not conformable to experience may properly be believed, events contrary to experience cannot. That an event is not fit to be credited which supposes the non-universality of a sequence previously considered to be universal, is so far, in my conception, from being true, that the most important of all discoveries in physics have been those whereby what were before imagined to be universal laws of nature, have been proved to be subject to exception. Take Mr. Bentham's own list (p. 285) of the exceptions to the law of gravitation: suppose all these unknown, the law might have been supposed universal, and the exceptions, when discovered, would have been so many violations of it: but do not these exceptions, with the exceptions again to them, and so on, compose by far the most valuable part of physical science?

SECT. VI.—*The improbability of a fact, relatively to a particular individual, depends upon the degree of his acquaintance with the course of nature.*

THE improbability of any alleged fact consists in its deviation from the established, and (as supposed) unvaried and invariable, course of nature.

Of what nature? — Of irrational nature, or rational, — of the nature of things, or of men, —

according to the nature of the alleged fact deposed to: according as it is a mere physical event, or a human act, the result of the operation of a human mind. According as the fact belongs to the one or the other class, the description of the improbability will admit of correspondent differences.

Does the fact exhibit any such deviation? if yes, in what degree? considerable enough, or not, to preponderate over the force of such testimony as the case presents? What, in respect of the supposed fact in question, is the unvaried and invariable course of nature? Immediately or ultimately, it is from the opinion of the judge, determined by the knowledge of the judge, that the answer to these questions, and the decision grounded on it, must come.

It must always be borne in mind that probability and improbability are not in strictness qualities of nature; they are qualities attributed to supposed natural facts in the way of fiction, for the convenience of discourse; attributed to the facts themselves, in consideration of the persuasion entertained concerning them in the mind of him by whom they are spoken of in this point of view. The alleged fact, is it, in his view of the matter, completely unconformable to the ordinary course of nature? He sets it down as improbable in the highest degree: or, in other words, as impossible. Is it in a less degree unconformable? he sets it down as simply improbable, and not altogether impossible: and so downwards, till the improbability presents itself as productive of no other degree of negative persuasion than what is capable of being subdued and made to give way to positive affirmation,

by the force of such affirmative evidence as the case affords.

The improbability being thus recognized to be purely relative, relative on each occasion to the idiosyncrasy of the individual by whom the fact in question is set down as improbable; it is easy to see, that, in this point of view, the probability or improbability of the fact will depend upon the degree of relative knowledge possessed by the individual judge; and thence upon the degree attainable, and generally attained, in the age, and country, and rank, in respect of mental cultivation, in which he is placed. A fact which, in Paphlagonia or Palestine, might, in the Augustan age, not have been too improbable to be established by testimony, in the estimation of the most knowing minds of those respective countries, might have presented itself as impossible to the same class of minds at Rome or Athens at that same time. A fact which in that same age might not have been incapable of establishing itself in the character of a probable one at Rome or Athens, even in that highest class of minds, might at this time be rejected as improbable by minds of the same class in Paris or London. A fact which would be established by a given force of testimony without a dissentient voice in the minds of the highest class at Tombuctoo, and without many dissentient voices in minds of the same class in Constantinople, might find nothing but incredulity in minds of equal relative superiority in London or Paris. Even in our own times, and within the hearing of Bow bells, Stockwell or Cock-lane might, on the strength of hearsay evidence, afford a temporary credence to a fact

to which no force of immediate testimony would be able to afford so much as a momentary credence in St. Stephen's chapel.

By the relative credibility or incredibility of a fact, I understand the chance it has of being believed or disbelieved by a given person.

The relative incredibility, as regards a particular person, of an anti-physical fact—a fact amounting to a violation of a law of nature,—will be in proportion to his acquaintance with the laws of nature. Suppose a person altogether unacquainted with the laws of nature, yet not altogether unaccustomed to hold converse with mankind: he would, upon the credit of a bare assertion, uttered by any person of his acquaintance, give credit to one fact as readily as to another: to the most flagrantly anti-physical fact, as well as to the most common fact: to a fact the most devious and extraordinary in degree or specie, as well as to the most ordinary fact: to the existence of a ghost or a devil, as well as to that of a man: to the existence of a man sixty feet, or no more than six inches, high, as well as to that of a man of six feet: to the existence of a nation of cyclops, with but one eye each, and that in the middle of the forehead, as well as to the existence of a nation with two eyes, in their ordinary place.

In this respect, all nations as well as all men are children for a time. Among savages, not to speak of barbarians, the mental state cannot be regarded but as a state to which this supposition is in a great degree applicable.

What is there that would not be believed in a nation in which it was generally understood, so generally as to be a position acted upon by law,

that guilt or innocence, mendacity or veracity, was to be determined by a man's walking blindfold hurt or unhurt in a maze of red-hot ploughshares?

Of a given apparently anti-physical fact, the relative incredibility will be apt to increase, not only with a man's acquaintance with the laws of nature, but with his acquaintance with the history, the correspondent part of the history, of the human mind: with the observations he has had occasion to make of the extreme frequency of incorrectness and mendacity among mankind, or rather of the extreme rarity of the opposite phenomena: of the extreme frequency of the instances in which either the one or the other has been reduced to certainty, sometimes by irreconcilable contradictions as between divers reports of the same transaction, sometimes by self-contradiction on the part of each.

In the case of an apparently anti-physical fact, reported by a writer or a number of writers in a distant period; to render it more credible that he should either have been a deceiver or deceived, than that the fact was true, it is not necessary that it should appear that he was acted upon by this or that particular cause of delusion, or that he had this or that point to gain, this or that specific advantage to reap, from the lie. All men are, occasionally, exposed to seduction in this way, to the temptation of swerving from the truth, by all sorts of motives. True it is that in this case there are two suppositions to make, for one that there is in the other. But, take each of these suppositions; what can be more probable?

Go back to distant ages, we shall find men of

the very first reputation for sagacity, for insight into the human heart, very imperfectly apprised (to appearance at least) of the causes of untrustworthiness to which extra-judicial testimony is exposed. Speaking of the two miraculous cures ascribed to the Emperor Vespasian, “*Utrumque*” (says Tacitus) “*qui interfuere, nunc quoque memorant, postquam nulum mendacio pretium.*” “By persons who were privy to the two transactions, both are still related, now that” (understand, by the extinction of that emperor’s family) “mendacity has no longer any reward to hope for.” No reward to hope for! As if punishment was not a still more irresistible principle of seduction than reward! as if forfeiture of reputation, of reputation for veracity, were no punishment!

By Tacitus, both these miracles were believed. The remark could have had no other object than to communicate that persuasion to his readers. Unless his intention was to deceive, he was himself deceived.

In England, miracles of the same kind, but prodigiously greater in number, and beyond comparison better attested, were believed, within these hundred years very generally believed; and now, perhaps, (anno 1826) not by a single human being: not even by any of the multitudes that still believe in witches and apparitions. It was among the attributes of the Stuart dynasty, to cure their subjects of the species of scrofula called the king’s evil. A piece of coined gold being touched by the monarch for the purpose, the patient wore it thereafter by a string upon his neck; for which purpose a hole was pierced in it. By family inheritance,

I have three of these pieces still by me. It was not by the vision of a god — the god Serapis — that so many beneficent monarchs were determined to exercise, for the benefit of their subjects, this healing power; it was by the experience of ages. Under James I. the practice began, or at least existed, with the 17th century; under Anne, it continued for the first fourteen years of the 18th: omitting the reprobate Charles and the usurping William, all of them monarchs of exemplary faith and piety. Would sovereigns such as these have lent a hand to an imposture?

Thus it is, that, in many instances, improbability is relative: the same fact is at once probable and improbable; probable to some persons, improbable to others: and this without any necessary imputation, on either side, on the judgment of those by whom such opposite decisions are pronounced.

Ignorance, though perhaps more exposed to erroneous judgments on the side of belief, is by no means unexposed to erroneous judgments on the side of disbelief; inasmuch as the analogies by which extraordinary incidents are brought within the sphere of probability, are, in proportion to the degree of their ignorance, apt to be without the compass of their knowledge.

The less extensive a man's acquaintance is with the ordinary course of nature, the greater is the number of those facts, which by him are not seen and understood to be within the ordinary course of nature: facts which, in his view of the matter, belong to the predicament of extraordinary things. The greater, therefore, is the number of those things which, being to him

extraordinary things, are by others reported, and by him (as occasion presents them to his observation) found and proved, to be true.

Supposed facts, which, besides being to him extraordinary, are really out of the course of nature, and not only so, but actually untrue, are by him neither seen nor suspected to be untrue. Why not? Because, by their being extraordinary to him, little cause is presented for suspecting them to be untrue: for many facts which to him are extraordinary, are by the general consent of those with whom he is acquainted held to be, and upon trial found to be, true. Nor, by their being really out of the ordinary course of nature, are they presented to him as being in a proportionable degree, if in any degree, improbable: for with the extraordinary course of nature, as distinct from the ordinary, he has little or no acquaintance.

Suppose a Turk, of the ordinary class of Turks in point of education, to have been told of the elevation of a number of persons in the air, and of the aerial voyage performed by them; and this by a bare statement of the fact so far as above described, and without any indication given of the cause by which the elevation was produced. Probably enough, neither disbelief, nor so much as any considerable surprise, would in his mind have been the result. To his disposition to give credence to this or any other fact of the extraordinary class, no great addition could probably remain to be made by ocular demonstration. Whatever fact of this description could be related to him, would be rendered sufficiently credible by a word, whatever it be, of which in English the

words magic or sorcery serve for representatives. By the Turks, Christians are considered either as being in general magicians, workers of wonders, or, at least, as abounding in magicians: and by magic one thing may be done as well as another. The contents of the machine by which this wonder was achieved, were in fact composed of rarefied air:—had this account of it been given to him, would he have credited it? Not unlikely; and so would he, as likely, had they been represented to him as composed of lead. To a people to whom the face of nature is not visible through any other medium than that of the Koran, one fact is not more unconformable to the course of nature than another.

When an air-balloon, on the hydrogen gas principle, performed for the first time, at St. Petersburg, an aerial voyage; certain Japanese, who, having been shipwrecked somewhere in Kamschatka, had from thence been conveyed to Petersburg, were of the number of the spectators. All the rest were wrapped up in amazement: the Japanese alone remained unaffected. A Russian noticing their unconcern, and asking for the cause of it,—“Oh!” said a Japanese, “this is nothing but magic; and in Japan we have practitioners in magic in abundance.”

In the long-established empire of Japan, it is probable, as in the long-established and neighbouring empire of China, they have jugglers, whose art consists in the production of whatsoever phenomena seem most unconformable to the known course of nature. In England, as well as in other superiorly-informed nations, such appearances are exhibited by jugglers, as it requires a better acquaintance with the

course of nature than falls to the lot of the bulk of the people, to distinguish from impossibilities ; and in China, the art of juggling, having been longer in use than in any European country, appears, by the instances given by travellers, to have been carried, in some particulars, to a still higher degree of perfection than any where in Europe.

The art of travelling in the air being referred to jugglery, and considered as no more than a particular branch of that commonly-practised art, all cause of wonder was at an end.

In the character of a faithful picture of real life, the Arabian Nights' Entertainments, to an Arabian understanding, are upon a par with other histories : and if in some points they differ from histories strictly and properly so called, it is only in the same respect as Robinson Crusoe differs from actual biography : though not actually true, they contain nothing but what might have been true ; and if, in any instance, they are not to be believed to be true, it is only because, upon a close inspection, it may be found that they are not given for such.

The author being, in the autumn of 1785, on board a Turkish vessel, on a voyage from Smyrna to Constantinople, a storm arose in the sea of Marmora, which made us glad to take refuge in a port on the Asiatic side, called Kiemed, where the first object we saw, as soon as we could see any thing, was the wreck of a vessel just driven on shore within a stone's throw of us.

There being several Franks of us on board, the master of the vessel, through the medium

of an interpreter, examined us all, for the purpose of knowing whether any such article as a fragment of an Egyptian mummy existed in the possession of any of us; and if so, whether we could favour him with a sight of it. The answer having been universally in the negative; when the storm was over, it was observed to us by the interpreter, that our deficiency in this curious article was, perhaps, a fortunate circumstance for us; mummy being among the implements known to be employed by Christians in the practice of divers magical arts, and, amongst others, of the art of raising storms: whereupon, had any such article been found in our possession, it would have been matter of consideration, as a means of abating the fury of the storm, whether to be satisfied with throwing overboard the magical implement, or to throw over the magicians along with it.

The theoretical principle being established on the ground of notoriety, the practical inferences seemed to follow from it consistently enough. If, by a piece of a dead body, preserved in a particular manner, and introduced on board a ship, a storm could be raised; what more natural than that, by throwing it out of the ship, the storm should be appeased? The cause taken away, the effect will follow. Moreover, if, upon the removal of the supposed cause, the effect should not follow,—if, after this magical implement had been thrown overboard, the storm should continue unappeased,—the continuance of it would be a proof that the cause of the storm, if removed in part, was not removed completely: it would be a sign that, along with this known implement, the magician

was in possession of some other implement or implements, not equally known, but equally well adapted to the purpose of raising storms : and, under the difficulty of ascertaining what were the other implements by the help of which the magician might be enabled to fulfil his wicked purpose, the surest course was to rid the ship of the magician himself, which done, his tools, were they ever so numerous, would do no mischief.

Be this as it may, the sagacious Turk might have placed his argument on ground absolutely impregnable, by calling in to his aid the principle of the Scotch philosopher. I have a propensity, he might have said, to believe whatever I hear, probable or improbable ; and this propensity is innate ; for who can tell me when it first began to shew itself ? But being innate, it is not derived from experience ; and being older than experience, it is stronger than experience ; nor, therefore, can any argument drawn from probability or improbability stand against it : for an argument drawn from probability or improbability rests on no other basis than that of experience : and when experience, or any thing that rests upon it, is encountered by the opposing pressure of the pre-established propensity, which it is that must yield is manifest enough.

The better acquainted we are with the course, the ordinary course, of nature, the better qualified we are, of course, for judging whether a given fact be conformable or unconformable to it.

As between credulity and incredulity, belief of false facts and disbelief of true ones, the

former will naturally present itself as being, in the greatest plenty, the fruit of ignorance. It certainly is so, in so far as ignorance is accompanied with the consciousness of its own existence. Such consciousness is a natural, and perhaps predominantly frequent, accompaniment of ignorance; but it is by no means an inseparable one. Much will depend upon the opportunities a man has of being witness of the proofs of a degree of knowledge superior to his own. Much will also depend upon the particular temper and cast of mind of individuals.

Carrying with them the productions of European arts, the voyagers that from time to time have, within the two or three last centuries, visited the newly-discovered parts of this our globe, have in general found the inhabitants well enough disposed to give credit to their visitors for reported wonders, on the strength of the wonders presented to their eyes: but this facility of credence has not been altogether without its exceptions. The case of the King of Siam is old enough to have been noted and commented upon by Locke.* When, in reporting the state of things in their own country, the Dutchmen who visited his dominions came to speak of the frozen scenes presented by their winters,—water hardened to such a degree as to bear men and waggons like dry land,—a laugh of scorn was the reply, and they were set down for impostors.

At that time of day, the advances made in natural science were as yet but inconsiderable; and the strangers by whom the wonder was

* Essay, vol. ii. ch. 15. p. 276.

reported, were, perhaps, not much more than upon a par with his Siamese majesty, in respect of their advances in the career of science ; or, at any rate, were not provided with any ready means of displaying any proofs of their superiority in his view. The fact was not conformable to the course of nature, in any such state of things as his opportunities of observation had presented to his view. He had, therefore, the same reason for disbelieving that fact, as we have for disbelieving facts which, by thousands and thousands that could be mentioned, a European, instructed or not instructed in the rudiments of physical science, would, at this time of day, be disposed to reject as incredible at the first word.

In London itself, that great metropolis which disputes with Paris the title of metropolis of the scientific world, his Siamese majesty found, within the compass of my own experience, a not unworthy representative in the person of an English physician. At that time, about twenty years or thereabouts had elapsed since the publication of the first experiment by which mercury, by the help of the Russian ice, had been exhibited in a solid state. In company with the learned doctor, I happened, on I forget what occasion, to make allusion to this experiment. With an air of authority, that age is not unapt to assume in its intercourse with youth, he pronounced the history to be a lie, and such a one as a man ought to take shame to himself for presuming to bring to view in any other character.

Solidity, liquidity, and gaseosity, appear now for some time to have been considered, in na-

tural philosophy, as the three states, of which, by combination with an appropriate portion of caloric, bodies in general, such as we are acquainted with, may be regarded as susceptible: insomuch that, — although instances, and those pretty numerous, are not wanting, in which this or that modification of matter has not as yet been seen assuming, or made to assume, this or that one of the three states, — yet, its being presented, though for the first time, in such hitherto unknown state, would no more be regarded as repugnant to any law of nature, or as an instance of an incredible deviation from the ordinary course of nature, than the existence of water in the state of ice or steam.

One of the most interesting remains of Grecian antiquity, is the narrative which Lucian (who, though not the most ingenious, may be set down as by far the wisest among the Grecian philosophers) Lucian, an eye-witness, has left us, of the pranks played by the impostor Alexander: a sort of Sidrophel in a higher sphere, who, upon the strength of a worm enclosed in an egg-shell, a tame real snake, and the head of an artificial one, set up for a prophet and prime minister of the god *Æsculapius*. Had any man paid a visit to Lucian, and said to him, “Yesterday I saw Alexander, with his serpent-god, sailing in the air in a boat, and mounting up to heaven, taking with him a globe of not less than thirty feet diameter, — saw him and watched him till his approach to the seat of Jupiter had rendered him invisible;” what would have been the reception given by the philosopher to his informant? Probably, much the same that the King of Siam gave to

the story of the solid water, and the English physician to the lie about the solid quicksilver. But suppose, the next day, Lucian himself had been witness to the ascent of *Æsculapius*, with his favourite, to his native heaven? He would either have been a convert to the godhead of the serpent, and the divine mission of the prophet Alexander, or have borrowed some such term as magic as a cover to his obstinacy; to a disbelief for which he would not have been able to have given any tolerable reasons.

A fact which, when viewed through the medium of a man's actual stock of physical science (for even the New Hollanders are not without some), presents itself as rendered incredible by its non-conformity to the known course of nature, may (if his mind be open to reasoning, and passion do not shut the door) be rendered credible to him, by shewing its conformity to this or that fact, rendered for the purpose present to his observation, or which, though not altogether foreign to his memory, had not happened to present itself in that point of view. Neither the frigorific saline mixtures we are acquainted with, nor ether, which, by the promptness of its evaporation, stands in lieu of all, could at that time have been exhibited to the King of Siam by his Batavian visitants. But a handful of nitre, which, being dissolved in boiling water, had been converted in appearance into its aqueous solvent, might, on its cooling, have been made to exhibit to the eyes of the incredulous monarch the transformation of the liquid into that semi-transparent stone which, in the regions of the north, affords natural bridges capable of conveying the heaviest ele-

phants over extensive rivers. Or,—unless in the climate of Siam there be something, which there does not seem likely to be, to prevent the success of an experiment which in Bengal is so commodiously subservient to wholesome luxury,—a set of porous and shallow earthen pans, with, or perhaps without, an artificial current of air, might, without any extraneous additament, have sufficed for converting, in any moderate quantity that could be required, the fable into fact.

Not quite so easy might have been the task of him who should have had to reconcile the facetious philosopher of Greece to the evidence of his senses. The favourite fluid (he might have said) of Minerva, rides triumphant and unsullied upon the element of Neptune. When, from the summit of Ida, a pine is rolled down and precipitated into the waves, it not only rides upon the water, but communicates its buoyancy to the hands that severed it from the parent earth. What the oil or the wood is to the water, an air, which you are not yet acquainted with, but which nature prepares already in great quantities, is to the air in which we move and breathe. Enclose this light air in a bag of sufficient size, it will carry up, as you see, not the bag only, but boats, and men, and gods, along with it; exactly as the pine, when by the force of the fall it has been driven to the bottom of the lake, rises by its own levity, and would still rise, though men and other heavy bodies were attached to it. It is not that the new air is devoid of weight, any more than the old air, by the impulse of which vessels are drawn by design along the surface,

and by accident to the bottom, of the waters : but,—the lighter air not being so obedient to the unknown power by which the effect we call weight is produced,—the lighter air, which, were it alone, would cling to the earth, is drawn off from it by its more powerful antagonist, carrying with it its receptacle, and the burdens you see attached to it.

Would this analogy have satisfied the scoffing philosopher, or would nothing less have satisfied him than the setting up a manufacture of hydrogen gas before his eyes ? This would have depended upon his particular frame of mind, upon the humour he happened to be in, and more or less perhaps upon the state of his quarrel with the impostor whose pranks he has detailed to us in so agreeable a narrative.

Opinions, recognised at present among the enlightened classes in enlightened nations as being unsupported by fact, and in opposition to those laws of nature which have been built on fact, have been erected into what may be styled so many false and spurious laws of nature. From these spurious laws, evidence, which on account of the extraordinariness of it would be deemed false, by reason of the circumstantial scientific evidence opposed to it by the science of the age and country, may derive, and in many instances has derived, but too effectual a support. At no time have even the most enlightened classes been altogether exempt from the delusion spread by such spurious laws of nature. The station of a judge, how high soever it may rank in the scale of mental illumination, has at no time been every where sufficient to exempt a man from false persua-

sions, grounded on the false laws of nature above spoken of.

Among these so unhappily prolific opinions, the most conspicuous and persuasive (not to say the only ones) are those which have had the religious sanction for their support. The persuasion generated has been produced, not by any facts by which the opinion has been seen to be supported, but by a persuasion of a very different sort; viz. that he in whose breast the principal persuasion in question should fail of being produced, would, by reason of such failure, be consigned to inconceivable and endless tortures.

If a clear line could be drawn, and were actually drawn, between time and time, insomuch that the dominion of these spurious laws of nature were understood to be confined to time long since past, the real law of nature reigning with undisputed dominion in time present and to come,—the error might not, in this point of view, be attended with any pernicious consequences in practice. But by no man has any satisfactory or so much as plausible reason been ever given, why any such line should be thought capable of being drawn any where: much less has it been shewn that, for any precise and satisfactory reason, it should be understood to have been drawn at this or that precise point of time.

Things being thus circumstanced; opinions enuntiative of false laws of nature, opinions that have received their birth at some widely-distant point of time, have, in times little anterior to the present, been productive of judicial decisions, by which much mischief has been

done, and a degree of alarm propagated through the community, such as could not have been spread by the most atrocious crimes. It has been the effect of such opinions, not only to give support to the false evidence which would otherwise find itself resisted, and with effect, by the circumstantial scientific evidence of the age and country, but even to give birth in the first instance to such false evidence.

In the seventeenth century, Urbain Grandier, for having employed devils to take possession of certain nuns at Loudun, and enable him to take possession of them for carnal purposes, was roasted alive by a slow fire, after having undergone other tortures. Of this catastrophe, the immediate authors were certain corrupt magistrates and corrupted witnesses of that time: but the original authors were the devils who, in a distant age and country, were cast into the herd of swine; together with so many others who, in that age and nation, found, in such abundance, such easy entrance into the human breast.

In England, not many years afterwards, Sir Matthew Hale, a judge of even proverbial probity,—a judge superior to all corruption, but not superior to delusion, if the belief in witchcraft be delusion,—hanged an individual for witchcraft: by the assistance of a jury, whose delusion had probably not waited for his, but, at any rate, was confirmed by it. Of this catastrophe, the immediate authors were the judge and jury, and the either corrupted or deluded witnesses of that place and time: but the original author was the witch of Endor, and those predecessors of hers in the same profession, for

whose punishment a law had been inserted into the Mosaic code.

The general evidence applied by scientific information to the direct evidence of particular extraordinary facts, is not always necessarily and without exception (though it is most apt to be) on the negative side ; in opposition to such direct evidence. Direct evidence, the truth of which is rendered suspicious by this circumstance,—viz. that the fact reported by it would, if true, be a violation of some acknowledged law of nature, — may be exempted from suspicion, by shewing that it is in conformity to some other, less extensive law of nature, which operates, as it were, as an *exception* to that which is more extensive. By magnetism, by electricity, by chemical attraction, by galvanism, by expansion and contraction, produced by the action of caloric on bodies, in their several states of solidity, liquidity, and gaseosity, motions are produced in a direction opposite to that in which the body in question is drawn by the more extensive law of gravitation. Of the attraction of gravity, some sort of conception must have been entertained in every, the rudest, age ; but in the ancient world, even in its most enlightened period, the conception entertained of this universal property of all matter was but imperfect, and was not expressed by any sufficiently comprehensive name. Of the other laws, which, as just mentioned, stand as it were as so many exceptions to that more general law, scarce any conception was in those days entertained : of the laws of magnetic, in particular, and electrical and galvanic motion, none whatever. In the museum at Oxford may be

seen (or at least might once be seen) a natural magnet, by which a mass of iron, weighing 1,200 lbs., is or was kept suspended. At the lectures there delivered on natural philosophy, might at the same time be seen an exhibition which, I suppose, is commonly enough repeated in other such lectures,—a plate of gold kept suspended for some moments in a state of absolute rest, by the antagonising forces of gravitation and electricity. Of late, in presence of numerous companies, different parts of a dead body have received, from the so recently discovered power of galvanism, motions opposing and overpowering the action of gravity.

In our own times and country, scarce a journeyman or a milliner's apprentice in a country town, to whom these particular and recently-discovered laws of nature are altogether unknown. Even to these inferior ranks, a fact of any of the classes above exemplified would, therefore, at present, be as far from appearing improbable, as the fact of a stone's falling to the ground after being dropt or projected from the hand. By a person now sitting in the station of a judge, even though he were selected from no higher rank in the scale of illumination, these facts would, any of them, be received upon any, the slightest, evidence. In the age of Lucian, had Lucian sat as judge, and any of these facts been exhibited to him in evidence, without any previous explanation; Lucian, notwithstanding all his knowledge and sagacity, or rather by reason of that very knowledge and sagacity, could never have failed to reject it as incredible.

Facts, then, which were true, have been re-

jected, and with reason rejected, as improbable. When a fact presents itself as improbable, does this experience afford any reason for crediting it as if it were true? Nothing like it. Disbelieving improbable things, we shall deceive ourselves once; believing them, we shall deceive ourselves nine hundred and ninety-nine times. Deceived we shall be, not unfrequently, do what we can: all that is left for us to aim at, is, so to order our judgment that the number of instances in which we are deceived shall be as small as possible.

Of eleven witnesses exhibited before a court of justice, and possessing, as far as appears, equal title to credit, ten may perjure themselves, and the remaining one may speak truth. In this case, if the judge gives credit to the ten witnesses, misdecision will be the consequence. But does it therefore follow that, *cæteris paribus*, ten witnesses are not to be believed in preference to one?

In practice, no difficulty is found in believing one fact, and disbelieving, at the same time, another, though both of them standing on the ground of the same evidence. Propensity leads to such distinctions; judgment reports the reasonableness of them.

In the Nuremberg Chronicle, two facts are reported in the same breath: one (that of the armies fighting in the atmosphere), to which, at present, no well-informed mind will afford,—the other (that of the stones falling from the same region), to which none will refuse,—its belief. Why this difference? The reason is obvious and convincing. The fact disbelieved is a fact unconformable to the known course of nature; and

to such a degree unconformable, that, the better a man is acquainted with the ordinary course of nature, and the more close the attention which in this view he pays to it, the more strongly he will be persuaded that the reporter or reporters (be they who they may) were either deceived or deceivers, rather than that such a fact should have been true. The fact believed, is a fact conformable to the course of nature: in former times not known to be so, but of late years ascertained to be so by a multitude of examples, many of which have undergone the most attentive and most scientific scrutiny.

SECT. VII.—*Improbability is a particular case of counter-evidence.*

THE case of improbability or impossibility, on the part of the fact, the existence of which is asserted by the testimony delivered in the first instance, will, when closely looked into, be seen to coincide with the case of counter-evidence.

Improbability is constituted by a mass of evidence of a mixt, and in a considerable degree subtle and recondite, nature: an article of circumstantial evidence deduced in the way of inference, out of an immense mass of direct evidence.

Improbability or impossibility consists (it has been seen) in the inference deduced from a supposed disconformity, more or less wide, on the part of the affirmed fact in question, as compared with the ordinary and known course of nature.

The direct evidence, from which this inference of the non-existence of the affirmed fact is

deduced, is composed of the several supposed reports or relations (added to the several supposed perceptions of the deposing witness himself) whereby the existence of the several supposed analogous facts of which the course of nature in this behalf is composed, has been supposed to be affirmed.

Operating thus in the way of counter-evidence with relation to the fact affirmed, this immense and in a manner infinite mass of direct evidence may, for distinction's sake, be termed *general* counter-evidence: the other evidence antecedently designated by the appellation of counter-evidence, being at the same time named *special* counter-evidence.*

Certain facts are considered as disaffirmed, certain negative facts in infinite multitude are considered as affirmed, by the perceptions and reports (extra-judicial reports indeed) of mankind in general, without any known exception: and from all these facts put together, in the character of evidentiary facts, the non-existence of the individual fact in question in the character of principal fact is inferred.

* *Improbability* on the part of the fact of which the existence is deposed to and asserted by an article of evidence, of testimony delivered in the first instance, may even be constituted by an article of *special* counter-evidence, in any case in which the probative force of the counter-evidence is, with reference to that of the evidence delivered in the first instance, infirmative only, and not destructive. Indeed, whether the effect of the conflict on the first-delivered evidence be infirmative only, or altogether destructive,—supposing always that any degree of probative force belongs to either of the opposite articles separately taken,—a degree of improbability, more or less considerable, will by each be impressed on the existence of the fact affirmed by the other.

Thus, supposing, down to the time in question (say the year 1763), the greatest length of way known, within the bounds of the country called England, to have been travelled by any one man in the compass of twenty-four hours, to have been 150 miles :—the existence of a man in a spot 200 miles distant from the spot in which the act in question is known to have been committed, and that within twenty-four hours of the time at which it is known to have been committed, will be sufficient to render the fact of his having been the person who committed it, to a certain degree improbable.*

Of all the instances of dispatch on journeys that ever came within my observation, (here we have *perception*), and of all that I ever heard of, (here we have an indefinite mass of evidence, *extra-judicially* indeed, not *judicially* delivered evidence), none ever exceeded 150 miles within the twenty-four hours. Here, if the witnesses are to be believed, we have a rate of dispatch equal to 200 miles in twenty-four hours. The supposed fact thus affirmed, is, therefore, out of the ordinary and known course of nature: and so widely distant from it, as to be improbable: and so great is the improbability, that, notwithstanding the affirmative testimony of the witnesses for the prosecution, the fact of their being either mendacious or under a mistake seems the less improbable fact of the two. My decision, therefore, is, that the criminal act charged upon this man was not committed by

* Instead of 200, say 12,000 miles, the distance of the opposite part of the earth's surface, and one would be apt to say that instead of improbability there was impossibility.

him. — Such, in the case in question, if developed at length, would be the language of the judge (under English law the jury) by whom, in the case in question, the fact affirmed by the first-delivered evidence was, on the ground of its improbability, disbelieved.

To illustrate the nature and effect of *improbability* in the character of an article of circumstantial evidence, opposed to, and adduced in disaffirmance of, the existence of the fact, which, howsoever affirmed by testimony, is thus charged with being *improbable*, — I will bring to view three examples: the case of water brought by cold into the state of ice; the case of air-balloons; and the case of stones falling upon the earth from immeasurable heights in the atmosphere.

A circumstance by which these examples are rendered all of them the more instructive, is, that, in every one of these instances, the fact that was or might have been rationally and properly objected to as improbable, was nevertheless, and is now, universally acknowledged to be true.

The case of the water and the ice, as reported by Locke, has already been brought to view.*

* This being one of the chapters which was written twice over by Mr. Bentham, the last time without reference to the first; the story of the King of Siam is told twice over at full length. As, however, it is brought to view for two very different purposes, viz. the first time, to illustrate the principle that the credibility of a fact relatively to a particular individual depends upon his acquaintance with the course of nature, and the second time, to exemplify the effect of improbability as an article of circumstantial evidence; and as, moreover, the illustrations which accompany the story, in the two places in which it is introduced, are different; it has not been thought advisable to strike it out in either place. — *Editor*.

In Siam, water is never in that state. The position of the country is in the torrid zone, and there is no elevation in it any where, of sufficient height to produce the degree of cold necessary to surmount in that respect the effect of exposure to the sun's heat. Admitted to the presence of the monarch of that country, an ambassador from Holland, in describing the state of things in his own, incidentally found occasion to speak of ice; of water reduced to that state in masses of such thickness as to bear men and carriages. At this point of the narrative he was stopped. "What you have been saying till now," said his majesty, "may be true: but by this I am satisfied you are false. Water turned into stone! was ever any such thing, or any thing like it, seen or heard of?"

The monarch was perfectly in the right. Water turned into stone, he had never either seen or heard of. Liars he had seen, as many as he had seen men. To him the supposed fact was altogether unconformable to the course of nature, much more so than any instance of mendacity: to us it is altogether conformable. In his eyes, it opposed an insuperable bar to the probative force of the testimony: in ours it would have opposed none.

Was he, then, in his situation, condemned to give everlasting discredit to facts thus indubitably true? By no means. Supposing his understanding powerful enough to comprehend the force of analogy, the conversion of water from a liquid to a solid state by the abstraction of heat might have been shewn to be conformable to facts in abundance, that either already

had been, or easily might have been, brought within the reach of his own experience, of his own perceptions.

When an asserted fact is disbelieved as improbable; the ground of its rejection, the efficient cause of the persuasion by which the existence of it is disaffirmed, is the notion of its being unconformable to the ordinary course of nature. Shew that there is no such disconformity, the improbability is removed altogether. Shew that the disconformity is not so wide as it had appeared to be, the improbability is diminished: the diminution is more or less considerable, according as the analogous facts brought to view to shew the conformity are more or less numerous, and, in the instance of each, the analogy more or less close.

In the eyes of the King of Siam, the improbability of the conversion of water from a liquid into a solid might have been diminished, by indicating to him the case of metallic substances. In the furnace of the founder, the gold with which your palace is decorated is in a state of liquidity, like that of the water in which your barges float: when, being removed from the fire, it becomes comparatively cold, it resumes then a state of solidity, like that which, during one part of the year, water resumes so regularly in our canals.

By this one example, the improbability might, in the monarch's eyes, at any rate, have been lessened. As to the degree in which it would have been lessened, that would have depended on the cast of his mind, and his opportunities of information.*

* That it might very well have happened to it not to be re-

The improbability might have been still further diminished, had the medical chest of the ambassador's physician happened to be furnished with a corresponding pair of those saline substances which, being separately dissolved in water, present each of them the appearance of water, but immediately on being mixed together constitute a solid and to all appearance a stony mass; the redundant water of the one being absorbed in crystallization by the other:—supposing always, that, while the chest of the medical man supplied the substances themselves, his mind furnished him, at that early period, with the knowledge of the properties, which, on this occasion, required to be displayed.

In the case of the air-balloons, no particular instance, in which, for any length of time, the fact of their ascension found any person to disbelieve it, ever happened to fall within my knowledge. The unbelievers, if any, were, from the first, more likely to be found among the uninitiated than among the initiated in the physical branch of science. The rarefaction and levity which is the long-known result of increase of temperature, — this, added to the known possibility of abstracting from an enclosed space the whole weight of the air that would have been contained in it, were sufficient to reduce very much, if not to remove altogether,

moved, is made evident, by the instance already mentioned of the medical man who pronounced the story of the freezing of mercury to be a lie. Water is not a metal; mercury is: and the experience of the doctor could scarce have failed to present to his notice metals more in number than were likely to have presented themselves to the monarch's notice.

the improbability of the fact in the first instance. The discovery of a gas which, under an elasticity and power of resistance equal to that of common air, possessed no more than from a tenth to a fifteenth part of its weight, brought it not long after within that class of facts, which oppose not in any degree the objection of improbability to the testimony of him by whom they are related as having fallen within the compass of his perceptions.

The case of the stones that, of late years, have, in so many well-attested instances, been stated to have fallen in different parts of the world from the sky upon the earth, at too great a distance from the nearest volcano to have had any such earthly seat of explosions for their source, brings to my own recollection the feelings which, at different times, reports to that effect presented to my mind. The Nuremberg Chronicle was the first source of information by which a fact, or supposed fact, of this kind, was presented to my notice. Among the wonders exhibited by graphical representation in this work, is a shower of stones, which, on a day therein recorded, is mentioned as having fallen upon the earth's surface.* On a glance bestowed, which was all that seemed worth bestowing, on the point in question, with the few words that served for the explanation of it, the stones were set down in my own mind as having been the missiles employed by the combatants in one of those pairs

* Folio 170, 198.

of armies whose combats in the air used at that time of day to be so frequent.*

A general recollection remains with me of having read, many years ago, in one of the London newspapers, a paragraph, stating a stone, or a number of stones, to have fallen from the clouds in England, at some place remote from the metropolis: I think it was in Yorkshire. This was the first instance that had met my observation, of an occurrence of this kind, related as having taken place at a point

* In the Nuremberg Chronicle, the following are the two passages:

One, without mentioning the year, is referred to the time of the Emperor Lotharius. It stands in p. 1, of fol. 170.

“Grandinem mire (*miræ*) magnitudinis his temporibus in Galliâ decidisse tradunt, quæ (*quæ*) pecora multa et nonnullos homines interemit. *Visa est tunc in ipsis grandinibus granum durissimum mire (*miræ*) longitudinis.*”

Supposing this true, splinters from an atmospherical stone must, after its explosion, have cooled to such a degree as to have become encrusted with frozen water, and thus become the *nuclei* of so many hailstones.

The other, p. 1, of fol. 198, is, by the two last preceding articles, referred to the year 1128.

“Acies ignee (*igneæ*) apparuerunt in celo (*cælo*), quæ per totum celum sparse (*sparsæ*) plurimâ parte noctis vise (*visæ*): et stelle (*stellæ*) per plures de celo in terram cecidisse vise sunt: superfusa aqua (*superfusâ aquâ*) fumus cum sono exibat.”

Supposing this true, the *stars* were *stones*: for they were luminous bodies; and these same luminous bodies were seen to fall upon the earth; and, after their fall, water being thrown upon them, noise and vapour were the result. They therefore fell, and it was upon the earth they fell; and were therefore not of the nature of those meteors which, under the name of shooting stars, are so frequently observed in the atmosphere shooting in all directions, but not observed to leave behind them, in any known part of the earth's surface, any traces of their existence.

of time near to that of its publication. A statement published in a London newspaper, with mention of time and place, exposed thereby to immediate scrutiny and contradiction, presented a very different claim to attention from any that could be presented by the production of a barbarous age, in which facts possibly true, and facts unquestionably false, were intermixed in every page.

Is it true, this story, or is it not? is the question I remember putting to myself. That it is altogether false (was the answer) is more than I could take upon myself to pronounce with full assurance. My acquaintance with the several branches of science concerned, is not such as to afford sufficient warrant for any such peremptory conclusion. But, within the time of scientific scrutiny, this is the first report of the kind that ever met my observation: whereas, in the periodical publications of the day, statements more or less erroneous occur every day, and erroneous reports, relative to facts lying within the division of physical science, are not unfrequent. If, therefore, I were obliged to lay a wager, with liberty to choose my side, it would be on the negative side, and on that side I should be content to lay considerable odds.

By the comparative degree of intelligence prevailing in modern times, the range of the species of evidence here in question has been considerably reduced: the question now is,—not whether, upon the credit of this or that article of human testimony, the existence of a fact confessedly out of the ordinary course of nature shall be believed,—but rather, whether, of the fact said to exist, the existence would be

out of, or (what comes to the same thing) repugnant to, the ordinary course of nature.

When credit was given to the existence of witchcraft, sorcerers, and ghosts, and judicial decisions were grounded on evidence attesting or supposing the existence of such facts, the question concerning the intrinsic probability of such facts was a question of great frequency, and of the highest practical importance. In those times of terror, women were punished, and always with death, for acts of witchcraft; men for acts of sorcery; human creatures of both sexes for being possessed, or causing others to be possessed, by devils: all were punished, or might have been punished, for all sorts of crimes, on the supposed evidence of ghosts.*

If ever it should happen that a man should be in danger of suffering punishment, or injustice in any other shape, on the credit of any such supposition, it would then be necessary to enter into a serious comparison of the two counter forces; the improbability of the alleged supernatural fact, on the one hand; on the other hand, the probative force of the testimony on which the probability of the existence of these supernatural facts rested. Happily, in the pre-

* In some publication, I believe in more than one, of the earlier part of the 18th century, or the latter part of the 17th, I remember, in former days, to have seen a print of a scene, in which, on the occasion of a public trial, the ghost of a murdered person appeared in court to give evidence against the murderer. From such an appearance, no danger could ever be to be apprehended for truth and justice. But the mischief would be, if the reported testimony of the ghost of a murdered man should be received in evidence, and gain credit; as his reported testimony, said to be given *dum in vitâ*, does in actual practice.

sent state of the public mind, this danger does not present itself as being seriously formidable. On the last occasion on which the notion of a ghost presented itself upon the judicial stage, his existence was not brought to view in the character of a subject matter of proof or argument; but his non-existence (I should have said, her non-existence, for it was a female ghost,) was assumed, and the assertors of it considered as having, by the assumption of that character, subjected themselves to legal punishment.

At present, the prevailing impression seems to be, that no fact, of a nature confessedly *supernatural*, is to be believed on the credit of human testimony; or, at any rate, of any such mass of human testimony as hath ever found itself outweighed by a preponderant mass of counter-testimony (composed, to wit, of an assemblage of witnesses superior in number and value taken together) in any court of justice.

While this mode of thinking (if I am correct in considering it as prevalent) continues in force; as often as the topic of impossibility, or improbability approaching to impossibility, is introduced, the question will be, — Supposing (for argument's sake) the existence of the alleged fact, would it be a supernatural one? or, in other words, a violation of any known law of nature? If it would, it is admitted on all hands, that the fact (that is, the allegation whereby the existence of it is asserted) is not true: but my proposition is, that, however extraordinary it may appear, it does not import the violation of any *law of nature*. There

is nothing, therefore, to prevent it from being believed on the credit of special human testimony: and, in particular, of such testimony as on my side has been adduced. Such, at this time of day, is the language of the party on whose side an article of testimony has been adduced, the probative force of which is on the other side encountered by the objection grounded on the intrinsic improbability of the alleged fact.

The same progress of intelligence, by which the mind of the judge is rendered better able to defend itself against any deceptions that might be attempted to be put upon it by false evidence brought forward in support of impossible or improbable facts, operates as a bar to prevent the bringing forward of such facts, and preserves his judicial faculties from being exposed to the attempt. Numerous as are the instances in which the discernment of the judge is put to the trial by false evidence, by evidence of false facts; facts which to the stain of falsehood add the characters of physical improbability, are seldom found of the number. It is not at present as in the days of magic and witchcraft, when the extraordinariness of the fact (so it did but derive its characters from that source) would, instead of diminishing, serve but to increase, its chance of being believed. False witnesses, in the planning of their tales of falsehood, take care to render them not unconformable in any respect, but, on the contrary, in all respects as conformable as possible, to what is understood to be the ordinary course of nature. When all is done that can be done to varnish the false tale, is the taint of improbability still

visible in it? the counter-evidence opposed to it, is little in danger of operating with less than its due weight. The reign of religious impostures, I mean impostures grounding their prospects of success on notions derived from religion, seems, throughout the field of scientific civilization, or (which happens to be the same thing) of Christendom, pretty well at an end. Judges are no where prepared to give credence to them; and, this being understood, suitors are as little prepared to hazard them. When, in the last century, the Cock-lane ghost afforded entertainment to an English court of justice, it did not present itself spontaneously; it was dragged into the light of day by persons who called down the hand of avenging justice upon the lying ape that gave it birth.

SECT. VIII.—*An objection answered.*

ON a loose and hasty survey, the case of impossibility or improbability—of intrinsic impossibility or improbability on the part of the supposed fact in question—might be apt to present itself in a different point of view from that in which it has been above exhibited; in a point of view in which the objection to the fact might be apt to appear not to belong to the head of circumstantial evidence; but to be constituted by a body of distinct evidence brought forward on the other side. This conception is accordingly in a manner implied in the import of the term *intrinsic*, applied as above: it may seem implied in the words *impossibility* and *improbability*, even when taken by themselves. Impossibility, it may be said, is a property that may with propriety be ascribed to the fact itself. Look at it

by itself, every one sees it at first glance to be impossible. Look at it in this point of view, you see it by itself: what you do see is the single fact in question: but, seeing this, what other facts do you see? what other facts do you look for? what other facts have you need to look for? Absolutely none.

This view of the matter is what seems likely enough to be entertained; it being presented to the mind, and in a manner warranted, by the turn of the language which, on the occasion in question, is commonly employed. Upon closer examination, however, the propriety of it will vanish: it will be seen, that the nature of the case indispensably requires that other facts should be taken into the account: in which case, such other facts, not being brought forward by any direct testimony, or other evidence, cannot but come under the head of circumstantial evidence.

Take one of the vulgar cases of witchcraft, at present in civilized countries a ludicrous one; in most Christian countries not very long ago, in some parts of some such countries perhaps even now, but too serious a one. An old man, or (to take the more common case) an old woman, travelling, at pleasure, with prodigious velocity, and in every direction, through the air, without any assistance at all for the journey, or none better than what may be supposed to be afforded by a broomstick. Do you believe it? No. Why? Because it is impossible. It is a fact in itself impossible. Are you in your senses? you will say so too. Would you have us go out of the subject, call in other facts, and attempt to reason about it? The very attempt to reason would be an irrational one.

The firmness of my persuasion on the subject can hardly be exceeded by any that could be entertained by a person, who, speaking of it, should employ such language as is above. But as to the source of that persuasion, upon examining it, I do not find it quite so simple. Were a fact of the description in question to be reported to me, I should regard it as not true : for what reasons ? because (not to look out for any mere repugnancies) it stands in contradiction, for example, to two physical laws. One is, that no body ever changes its place without some specific cause of motion :* another is, that, even when exposed to the action of any such specific cause of motion, no body suffers any such change of place, unless the force of such specific cause be in a degree sufficient to overcome the impediment opposed by the attraction of gravity.

Such are the two laws in question : but, in alleging (as I do for shortness) the existence of these two ideal, and as they might be termed *verbal*, laws, what is it that I allege in substance ? In truth, nothing more in either case, than an assemblage (though that an immensely multitudinous one) of facts agreeing with each other in a certain point of view ; with which facts the extraordinary phenomenon in question is seen to be unconformable. All bodies that I know any thing of, tend towards the centre of the earth. By what consideration is it, that I am led to form a proposition so general and exclusive ? By these which follow. Every motion I make or experience, every minute of time I

* Of the causes of motion, an enumeration has been given *suprà*, pp. 285, 286.

sit or stand without any considerable motion, every motion I feel or see on the part of other bodies, concurs in giving me a confirmation of the truth of it, so far as depends upon the evidence of my own senses. Do I apply for further information to the presumed experience and observation, to the actual relation and declaration, of other individuals, my fellow-creatures? the information runs constantly, and without any the least exception, in the same strain. Oral evidence and written evidence,—men and books,—books touching on this particular subject directly and professedly, books touching on it incidentally and collaterally,—all concur in giving evidence on the same side. All this, body of information, all this immense and continually accumulating body of information, may at any time, so far as it were worth while to pursue the thread of analysis, be resolved into so many distinct articles of evidence, ranged under the heads of distinction already exhibited in this work.

After all, what does it amount to? Not any direct evidence disaffirming the existence of the supposed magic journey. What then? So many articles of circumstantial evidence; neither more nor less. But this circumstantial evidence, this supposed disaffirming evidence, (it may again be asked), how does it disprove the truth of the supposed affirmative evidence? In no other individual instance was motion ever produced without a distinct assignable cause, referable to some one or other of the enumerated heads: in no other individual instance was the force of gravity ever overcome by a force less considerable than its own: to come

to the point at once, in no other individual instance was an old woman ever carried through the air, either without any assisting instrument, or with an instrument of no greater degree of appropriate efficacy than a broomstick, by the exertions either of her own volition, or by the exertions of the volition of any other being (such, for example, as a devil), applying itself to her bodily faculties for that purpose.

But, from the non-existence of any such extraordinarily produced motions in those instances, numerous as they are, how does it follow that no such motions have been produced in this instance? In none of those instances has there been any direct evidence affirming the existence of such extraordinarily produced motions. But in this instance such affirmative evidence does exist. Continue then to disbelieve the existence of such extraordinarily produced motions in those several instances; but think not, from their non-existence in those instances, to prove their non-existence, much less their impossibility, in this. Think not that, because their existence is not to be believed without evidence, therefore their existence can be reasonably disbelieved against evidence.

I should not expect to find in the person of any reader of these pages, an individual in whose mind a persuasion of the existence of any such aërial journey would, by the above train of reasoning, be produced. On the other hand, neither do I see how it is possible to contest the truth of it, so far as concerns the position it rests upon, to wit, that all the argument that is adduced, or can be adduced, in disproof of such supposed fact, amounts to no more than this ob-

servation, viz. the want of consistency, conformity, agreement, analogy, (take what word we will, it makes no difference), between this extraordinary supposed fact, and the other ordinary facts above brought to view, of the truth of which we have been sufficiently persuaded by direct evidence. Yet, upon no stronger nor other ground than this disconformity, we scruple not to disbelieve such extraordinary facts; and that with so firm a degree of persuasion, as, without difficulty, and almost without thought, to pronounce them to be *impossible*.

So far, so good: but this propensity in our minds, does it alter, does it influence in any respect, the nature of the facts themselves? By disbelieving the existence, past, present, or future, of any fact whatsoever, is it in our power to destroy, to annihilate, its existence? to cause a fact never to have existed, for example, that in truth has existed? Unquestionably not. Most certainly, not any influence on the existence of the facts themselves can be exercised by the opinion such beings as we entertain of their existence. Yet, after all, when we come to inquire what is the nature of the effects which any such disconformity (or rather our observation of the existence of such disconformity, which is all we have of it,) is capable of producing,—the answer is, a disposition on our part to disbelieve the existence of the supposed extraordinary fact: a tendency in our own minds, not any tendency in the facts themselves.

Thus much indeed may be added, viz. that, so often as a man in his proceedings assumes the falsity of such facts, so often will he, in that

respect, act rationally, and find his conclusions warranted by experience : so often as he assumes the truth of them, and acts upon that foundation, so often will he find himself deceived, completely and deplorably deceived. This argument, after all, will, upon a strict scrutiny, appear to amount to nothing : to be in appearance perhaps a distinct and additional argument, but, in truth, so much of it as is true, no more than the same represented over again in another point of view. As to every thing that is to come,—as to all supposed future results,—it is mere surmise, mere opinion, without facts, without evidence ; a mere assumption of the matter in dispute. As to all past results, it amounts to no more than the already alleged and admitted disconformity, served up only in another shape.

What, then, is the true reply to the argument in question, supposing it adduced by a believer in witchcraft,—adduced for the purpose of weakening our confidence in the proof afforded, by the disconformity in question, of the non-existence of that practice ? It is this ; viz. that whatever argument is capable of being brought forward for the purpose of weakening our confidence in the argument indicative of the non-existence of that practice, applies in like manner, but with much greater force, to every argument that can be brought forward in favour of its existence. The travelling of old women, with or without broomsticks, through the air, is that sort of event which even you, who affirm the existence of it in this or that particular instance, admit not to be a common one. But the existence of persons who, by any one of a great variety of motives, are impelled, and eventually compelled, to exhibit relations of facts, ordinary

as well as extraordinary, which, on examination, prove not to be true, is a fact unhappily but too often verified. The action of old women in the character of witches, is a fact which, according to your own statement, has happened but now and then, at this or that particular time and place : but the action of men and women, old and young, with brooms and without, in the character of liars, is that sort of event which has been happening at all times and in all places of which we have any account. This is so true, that a wager (for though a wager is no direct proof of any fact which is the subject of it, it is, however, a proof of the real confidence of him who joins in it, and a punishment for rash confidence on the part of him who loses it,) in the character of an argument *ad hominem* at least, a wager on this subject might be brought forward, not altogether without congruity. Shew witches on your part, while I on my part shew liars, for the space of a term in Westminster Hall, at so many guineas a-head, and see whose purse will be fullest at the end of it.

When I have to choose between believing a common, and believing an uncommon, event, I believe the former, in preference to the latter : Why ? Because, in the very words which I make use of, it is implied, that the event called common has hitherto been of more frequent occurrence than the event called uncommon : and to suppose that, having been hitherto more frequent, it will continue to be so, is only to believe, what all experience testifies, that the course of nature is uniform.

The conclusion seems to be, that, in support of a persuasion of the impossibility of any fact,

the best and utmost proof which the nature of the case admits of, is the indication of its disconformity with some class of facts indicated by those propositions which, for the convenience of discourse, have been received under the appellation of laws of nature : and that such proof, so given, of such disconformity, may, with propriety, be referred to the head of circumstantial evidence.

Certainty, absolute certainty, is a satisfaction which on every ground of inquiry we are continually grasping at, but which the inexorable nature of things has placed for ever out of our reach. Practical certainty, a degree of assurance sufficient for practice, is a blessing, the attainment of which, as often as it lies in our way to attain it, may be sufficient to console us under the want of any such superfluous and unattainable acquisitions.

SECT. IX.—*Untrustworthiness of the evidence by which facts disconformable to the course of nature have been attempted to be proved.*

THE accreditation of anti-physical or supernatural facts is by no means a matter of indifference to justice ; — even of facts which, with relation to the fact upon the carpet, have no other circumstance in common than their being (on the supposition of their truth) supernatural facts. Every such fact, if admitted for true, opens the door for the admission of every other : it establishes the precedent : it establishes this generally applicable proposition, viz. that repugnancy to the obvious laws of nature is no bar to credibility. Give credit to any one in-

stance of witchcraft, with what consistency or reason can you, on the mere ground of natural incredibility, refuse to give credit to any other?

Such being the tendency of credit given to supernatural facts, — such the mischievous influence of supernatural facts, in themselves indifferent and innoxious; it may be not unuseful to bring to view such considerations as tend to diminish the credibility of anti-physical facts in the lump.

I. No fact of this class was ever established by that sort of evidence which, under the best system of procedure in respect to evidence, is considered as the best evidence, extracted in the best manner; and which, though termed the best sort, is not to be considered as an extraordinary sort, but the sort which is ordinarily required and obtained in ordinary cases.

II. Accordingly, anti-physical facts are seldom represented any where, never in the face of justice, as having manifested themselves in the presence of divers persons at the same time.

In the instance of ghosts and apparitions, this has already been matter of general observation. Why so?

1. A persuasion of this sort has in many instances been sincere, — the consequence of delusion. In the instance of a celebrated author of Berlin,* to whom we are indebted for a most curious and instructive account of his own case, the appearance was the result of bodily indisposition; and the unreality of the

* Nicolai: in Tilloch's Philosophical Magazine, and Hibbert's Philosophy of Apparitions.

existence of a correspondent external object, known by the patient at the time. The apparition appears not to two persons at once. Why?—Because two persons are not subject to the same indisposition, bodily or mental, manifesting itself in the same manner, at the same time.

2. Where the reported perception has not had delusion, but self-conscious mendacity, for its cause, it has never happened that two persons have concurred in the utterance of such report, on any judicial, or solemn, though extrajudicial, occasion. Why?—Because of the extreme and manifest difficulty of carrying through any such plan of imposition with success. Subjected to examination, they could not hope to escape contradicting themselves, as well as one another. Accordingly, when a man embarks in a plan of this kind, he chooses the company and the occasion, and takes care not to expose his tale to contradiction, designed or undesigned, from a confederate.

III. The anti-physical facts thus reported are never of the permanent, but always of the evanescent, kind.

Why?—Because, were they of the permanent kind, the production of the object constituting the material source of the *real* evidence would of course be called for: nor could credence be expected, unless it were produced. This case, when looked nearly into, is found resolvable into the preceding one. Why?—Because, supposing the source of evidence produced, and the evidence extracted from it, under the eye of the judge, the anti-physical fact

manifests itself in the presence of divers persons at once.

If, in any instance, the exhibition of the anti-physical fact in the presence of divers persons has been undertaken or attempted, it has been in the way of legerdemain and imposture. What then is legerdemain? It is the apparent violation of some law or laws of nature,—the circumstances which if known would shew that no such violation existed, being concealed.

Upon this view of the matter, it should seem that those who maintain, in the character of a universal proposition, the non-existence of such physical facts as above described, may safely and even consistently admit their existence, in the event of their being deposed to by a considerable number of unexceptionable witnesses, some or all of them of good character, their testimony being extracted by a judicial examination, conducted with competent ability, in the best mode.

That the evidence should be extracted in the best mode, is a condition altogether essential. For, if you will accept of a bad mode,—of a mode which English judges, knowing the best and the value of the best, accept of, not only in preference but to the exclusion of the best,—you may prove witchcraft, in the manner in which witchcraft has been proved, and conclusively, to the destruction of the defendant, in any quantity you please. In the closet of a judge or other person having mercy or destruction in his power, you may transform old women into witches by confession, in any number that you please; and, by taking upon yourself

the wording of the confession, leaving nothing to do to the witch besides the signing with her mark, you save her so much trouble. Of course, you will not in this case fall into any such inconsistency as that of calling for the personal evidence to be corroborated (as in other cases) by *real* evidence; that is, of the permanent kind, as above.

SECT. X.—*Motives tending to produce affirmation of, and belief in, facts disconformable to the course of nature.*

IN the case of a fact in regard to which its apparent anti-physicality, its apparent incompatibility with the laws of nature, operates as a disprobative circumstance; the probative force of the evidence on the other side,—the probative force of the testimony deposing in affirmance of the fact,—is, on various occasions, apt to be subjected to diminution from the same cause. In determining whether any degree of credence ought to be given to an apparently anti-physical fact, regard must be had, not only to the circumstantial evidence afforded by its apparent anti-physicality, but also to the probability of seductive motives acting upon the witnesses by whom the fact is affirmed.

Various are the occasions on which, by the inordinate and seductive influence of this or that species of motive, men are led to represent as true, facts which if they were true would be anti-physical, but which are not true. Various are the classes of anti-physical facts, to the truth of which men are, on those occasions, led to depose. Coupling together the nature of the fact and the nature of the occasion, I proceed

to bring to view some of the principal instances in which this cause of deception has been observed to operate.

In all these several cases, it may be of use here to premise that the seductive power of the species of motive in question, applying as it were to two different quarters of the mind at once, the understanding and the will, operates upon it with a double influence. What is not true, it prompts a man to regard as true; and what is neither true, nor so much as by him regarded as being so, it prompts him to report as if it were true.

I. Facts promising wealth. Transmutation of less valuable metals into gold. Seductive motive, in the character of a cause of delusion applying to the understanding of the person addressed, the person to whom the report is made,—the love of the matter of wealth. Seductive motive applying to the understanding of the original reporter (the supposed operator), in case of delusion (simple incorrectness, without mendacity),—the same; also, the pleasure of curiosity, the pleasure of reputation, and of the power attending it. Seductive motive applying, in case of mendacity, to the will,—love of the matter of wealth, viz. the wealth to be gained by the sale of the false secret.

Transmutation of a less valuable metal into gold, is in itself neither more nor less credible,—a fact neither more nor less anti-physical, nor devious *in specie*,*—than transmutation of gold

* By transmutation, according to the sense in which it is understood, may be signified, either a pair of anti-physical facts, or a fact simply devious *in specie*. Understood in a literal sense, it involves two anti-physical facts: annihilation

into a less valuable metal. Yet, the probative force of a testimony asserting the transmutation of another metal into gold, would be less than that of a testimony asserting the reverse. Why? Because the aggregate force of the seductive motives above mentioned is so much greater in the latter case than in the former. In the latter case, the most powerful of all, the desire of wealth, does not apply.

II. Cure of diseases by supposed inadequate means. Seductive motives applying in the character of a cause of delusion to the understanding of the person addressed, — aversion to the pains of sickness ; love of life. Seductive motive applying, in the case of delusion, to the understanding of the original reporter (the supposed operator), — the same as in the case of the transmutation of metals. Seductive motive applying, in the case of mendacity, to his will, — the same as in the case of delusion.

In this case, the fact of the cure of the disease in question by the operation of the supposed remedy in question, is one of seven contending facts, of all which the comparative probability requires to be weighed.

1. No real, or at least such, disease : the symptoms really existing, but the result of the imagination.

of the other metal, creation of the gold. On either of the two following suppositions, it is but a fact simply devious :—
1. Gold is a compound of two other bodies : they are transmuted into gold, by being mixed together, in the requisite manner and in the requisite proportions. 2. Gold is one of divers ingredients in the composition of another known body : by the separation of the other ingredients, the remaining ingredient is transmuted into gold.

2. No real disease: the symptoms mendaciously reported.

3. The disease cured, but by the mere influence of the imagination, not by the operation of the supposed remedy,—or by some other remedy.

4. The disease gone off of itself: cured, without the assistance of the imagination, by the unknown healing power of nature, or by the cessation of the action of the morbid cause.

5. The disease not completely cured, *i. e.* not ultimately cured, but the symptoms mollified or removed for a time; viz. by either of the two preceding causes, Nos. 3 and 4.

6. The disease not cured in any degree: the cessation of the symptoms being falsely reported, whether through delusion or mendacity, and whether on the part of the patient or of the medical practitioner.

7. Or, lastly, the disease cured, and by the operation of the supposed remedy.

Of the delusive influence of the imagination, exemplifications may be found in the choice made formerly of medicines. Gold, it was thought, must be a sovereign remedy; and all the efforts of industry were employed to make it potable. A remedy for diseases? why?—Because it was so valuable; because it was so rare. Diamonds are still more valuable: happily they were never employed for the cure of diseases: partly, perhaps, because they were so much more difficult to come at than gold; partly, because there was no hope of rendering them potable.

III. Facts promising happiness, threatening

unhappiness, both in the extreme. The fact in question, spoken of as evidentiary of a commission given by a supernatural being to a man, to issue commands to any or all other men; those commands converted into laws, by threats as well as promises: by prediction of pains to be endured in this or a future life, in case of disobedience; of pleasures, in case of obedience. Take even the promises alone, without the threats,—the seductive force is already beyond comparison greater than in the case of the making of gold, or the supernatural cure of diseases: add the threats, it receives a further and prodigiously greater increase.

Prudence suggests and requires the yielding to the probative force of this fact,—the giving credence to it, without staying to inquire into the intrinsic credibility of it; into its coincidence or deviousness, in degree or specie, with reference to the usual course of nature; into its conformity or repugnancy to the obvious laws of nature.

In this way,—by the help of an instrument of seduction which seems to be ready made, courting the hand of whoever has confidence enough to take it up and use it, — any man (it might seem) would have it in his power to impose laws, and those irresistible ones, upon any and every other. Such, accordingly, might have been the result, if the operation had been confined to one person, or if the operators, in whatever number, had agreed among themselves. Happily for human liberty at least (not to speak of happiness and virtue), no such concord has existed. In different nations, sometimes even in the same nation, legislators seek-

ing to rule men by this instrument have come forward, opposing and combating one another with this instrument, no less decidedly and strenuously than others with the sword. Each has proclaimed to the world,—These of mine are the true wonders; all others, all those others that you hear of, are false: these that I promulgate to you are the genuine commands; all others, all those others that you hear of, are spurious. Divided thus, and opposed to itself, the seductive force, how seldom soever effectually resisted, ceased to be absolutely irresistible.

Such are the motives by which a man may be urged to give credit to untrue facts. But how comes it to be in his power? Such is the force by which the will of man is subdued; but by what means is the understanding itself brought into subjection by the will?

I answer,—judgment, opinion, persuasion, is in a very considerable degree under the dominion of the will; discourse, declared opinion, altogether. But it is the nature of opinion declared, truly or falsely declared, by one man, to produce real opinion on the part of another.

Judgment in the power of the will? by what means? By these means. To bestow attention on one consideration, to refuse it to another, is altogether in the power of the will. It is in the power of a judge to hear one man speak in the character of a witness, to refuse to hear another; to hear one paper read in the character of an evidentiary document, to refuse to hear another. The power which, in the station of a judge, a man thus exercises in relation to persons and papers, the mind of every man, sitting in the tribunal established in his own

bosom, exercises at pleasure over arguments and ideas : over the contents of evidentiary discourses, in the state in which, through the medium of the perceptive faculty, they have been introduced into the memory. An idea to which a man's attention refuses itself, is, to every practical purpose, during the continuance of such refusal, as completely excluded, and thence rendered as completely inoperative, as the testimony of a witness, whom, before he has begun to speak, the judge has sent out of court ; or a paper which he has disposed of in the same way, before any part of it has been read.*

* If hope or fear are employed in influencing the discourse employed in relation to persuasion, — the discourse employed in giving expression to persuasion or the pretence of it, — they are thereby employed in the promotion or the subornation of mendacity. For if truth, if veracity, be all that is desired, reward and punishment, hope and fear, are alike useless : it is only by giving birth to falsehood, to wilful falsehood, to mendacity, that they are capable of producing any effect. If the persuasion which a man is about to declare will be on the side desired, whether reward be given to him in that event or no, whether punishment will be given to him in the event of his declaring it on the opposite side or no, — neither reward nor punishment can be of any use. The only supposition on which they can be of any use, is, that, if left free to declare his persuasion, he would declare it on the side opposite to that which is desired.

Thus it is, that, whether hope or fear, expectation of reward or punishment, are employed in influencing persuasion itself, or discourse purporting to be the expression of it, they are employed in depraving the constitution of the human mind. If in influencing persuasion itself, then it is to the intellectual part of the mental frame that the poison is applied : if in influencing discourse purporting to be the expression of persuasion, then to the moral part.

But in general the poison operates upon both parts together. To be habitually occupied in the utterance of wilful falsehood, is a painful thought ; to be thus occupied for lucre,

That discourse of all kinds, more especially discourse declarative of opinion, is completely in the power of the will, is manifest enough. But he who is completely master of men's discourses, is little less than completely master of men's opinions. It is by the discourse of A, that the opinion of B is governed, much more than by any reflections of his own. To take upon trust from others (that is, from the discourses of others) his own opinions, is, on by far the greater part of the subjects that come under his cognizance and call upon him in one way or other for his decision, the lot, the inevitable lot, of the wisest and most cautious among mankind : how much more frequently so, that of the ignorant, the rash, the headstrong, the unthinking multitude !

How wicked (it is frequently said) how absurd and hopeless the enterprise, to make war upon opinions ! Alas ! would it were as absurd and hopeless, as it is wicked and pernicious ! Upon opinions, in an immediate way, yes. To crush the idea in the mind, to act upon it by mechanical pressure or impulse, is not in the power of the sword or of the rod. In an unim-

is a reflection that renders the thought still more painful. To rid himself of it as far as possible, a man strives with might and main to believe what he stands engaged to say that he believes : he keeps his attention nailed to the considerations that operate in favour of that side ; he turns it aside with horror from all considerations that operate in favour of the opposite side.

Thus it is that the principle by which merit and reward are attached to belief, blame and punishment to unbelief, is irreconcilably hostile not only to wisdom, but to virtue. Folly, vice, and misery, are the fruits, of which, in proportion to its prevalence, it is productive.

mediate, though, for efficacy, not too remote way, through the medium of discourses, no : for what, in the case of opinions, (unhappily for mankind) is but too much in the power of the sword and of the rod, is, to crush the enuntiating and offending pen or tongue : to cut asunder the muscles by which they are moved.

Unhappily, the power of the will over opinion, through the medium of discourse, is but too well understood by men in power. Meantime, thus much is plain enough : the more credible the facts in themselves are, the less need has a man to seek to gain credence for them by such means. By such means, credit may be given to facts the most absurd, currency to opinions the most pernicious. Facts which are true, opinions which in their influence are beneficial to society, have no need of such support. If this be to be admitted, the consequence seems undeniable. To employ such means for the securing credence to any fact, is to confess its falsehood and absurdity ; to employ such means for the support of any opinion, is to confess its erroneousness and mischievousness. To pursue such ends by such means, is to betray, and virtually to confess, the practice of imposture, the consciousness of guilt.

The propensity to give credence to false facts, to give adoption and currency and practical influence to opinions howsoever absurd and pernicious, wheresoever reward or punishment is conceived as annexed, by supernatural and irresistible power, to the operation of giving credence or discredence to any alleged fact, is of itself too strong to need strengthening by

any factitious means,—by the application of political rewards or punishments to that same purpose. Ascribe merit to belief, belief will naturally be upon the look-out for the most difficultly credible facts to attach upon. In the belief of facts which present themselves as true, there can be no merit; since there is no exertion, no opportunity given to any one man to distinguish himself from any other, no opportunity to the most obsequious to distinguish himself from the most refractory. The difficulty (as far as there is any) consists in the giving credence to facts which, of themselves, present themselves as incredible: and the more incredible, the more merit; because without exertion there can be no merit, and the greater the exertion (whatever be the line) the greater the merit, as every man is ready to acknowledge. The more obvious and obtrusive the considerations by which, if attended to, the fact would be shewn to be incredible; the greater the exertion necessary to keep them out.

Not that the difficulty, such as it is, is a difficulty which any one need despair or doubt of being able to surmount. It is a contention in which, in proportion to a man's weakness of mind, he will have the advantage over the strong; in proportion to his ignorance, over the knowing; in proportion to his folly, over the wise; in proportion to his improbity, over the upright.*

* In the field of theology (all history joins in proving it) the attachment manifested by men to an opinion, and in particular by men in power, is strenuous and inflexible, in the direct proportion of its absurdity. The effect is the result of the conjoint influence of a variety of causes.

It is not wonderful that motives and interests should have the power of producing

1. With the zealous and sincere; the more palpably and flagrantly absurd the proposition,—the greater the reluctance on the part of a man's understanding to the adoption of it,—the greater and more powerful the effort necessary to overcome that reluctance,—the greater is the difficulty, and thence the apparent merit, of the sacrifice. If the sacrifice of the body is an oblation acceptable to the more than canine appetite of a malevolent and jealous deity; the sacrifice of the nobler part, the mind, the understanding itself, must be a still more grateful sacrifice.

2. Insincere, or even sincere; the greater the absurdity of the proposition, the greater the impossibility of obtaining in favour of it that complete and imperturbable serenity of mind which accompanies the conviction impressed upon the mind by real and familiar truths: the greater, consequently, the irritation produced by that presumptive evidence of the falsity of the proposition, the amount of which is swelled by every instance of disbelief on the part of other minds. Every such instance of dissent constitutes a sort of circumstantial presumptive evidence of the erroneousness of the proposition thus adhered to. Every such piece of evidence forms an obstacle to the formation, entertainment, or continuance, of the persuasion which a man has it so much at heart to entertain (if sincere), or (if insincere) to appear to entertain, without prejudice to his reputation for sincerity in the circle in which he moves.

3. Sincere, or insincere; the more palpable the absurdity, the greater is the triumph, the more entire the mastery, obtained over those minds from whom an assent, real or apparent, can be procured for it. *Swallow this poison*, is among the commands which impostors have been found impudent enough to issue, and fanatics mad enough to obey. Such (has the triumphant impostor said to the astonished strangers whom he meant to impress with the irresistible plenitude of his power)—such are the fruits of faith, when it is sincere. *Swallow this nonsense*, is the criterion of obedience imposed by each domineering dogmatist upon the proselytes, whose opinions, or whose language, the force of hope or fear has placed under his command. The more gross the nonsense, the more prostrate is the obedience on one part, the more absolute the power on the other.

belief in anti-physical facts ; since they are found by experience to have the power of producing belief even in self-contradictory propositions.

Upon the face of the matter, eyes being closed against experience, it would seem that belief in self-contradictory propositions is impossible. On the contrary, it is altogether natural : and so natural as to be very generally exemplified.

It has already been shewn in what manner the expectation of reward or punishment, as connected with particular opinions, operates upon the judgment, through the medium of the attention.

When the idea of merit comes to be attached to the act of belief, the degree of merit will naturally be supposed to be in proportion to the difficulty of believing, and the consequent exertion required for the production of belief.

But, to the eyes of an observer, the existence of exertion bestowed on the endeavour to produce belief has no surer test, — the intensity of it in the character of an operative cause has no more correct measure, — than the magnitude of the opposing forces which must have been overcome ere the effect has been accomplished. And the more repugnant to reason any proposition is, the more powerful are the obstacles which it opposes to any exertions that are made to cause it to be believed : consequently, if the obstacle has been overcome, the more powerful must have been the exertions by which it has been overcome, by which the effect thus aimed at has been produced : and the greater, it is therefore supposed, will be the reward attached

to such meritorious exertions. Thus it is, that, the more absurd any proposition is, the greater efforts are naturally made to believe it.

Be the subject what it may; if the proposition proposed for belief be a proposition of the affirmative cast, belief will depend partly upon the probative force of the affirmative evidence, partly upon the weakness of the disaffirmative evidence, or the non-existence of any such evidence: meaning always by existence, relative existence; existence in the place in question,—the judicatory in which the cause is heard, and is to be determined.

As to affirmative evidence; in the case here in question, an *authority* (that is, the opinion, real or pretended, of some other person or persons, whose situation affords a ground more or less strong for supposing them conversant with the subject matter in question) will always operate with more or less probative force in the character of affirmative evidence. But,—for the exclusion of all disaffirmative evidence, and thence of all disprobative force,—the power of the will, applied in that direction with the degree of exertion required by the nature of the case, will of course suffice. Finding, therefore, no disprobative force to oppose it, the prevalence of the probative force of the affirmative evidence, and the production of the correspondent affirmative persuasion, become alike a matter of course.

The probative force of *authority*, in the character of evidence, will be, on the one hand, as the plenitude of ascribed knowledge; on the other, as the completeness of self-conscious ignorance.

If, by hope of reward alone, the effect in question (viz. belief) is thus capable of being produced; how much more surely by punishment! an instrument, which, apparent proximity and certainty being the same in both cases, acts with so much superior force. If by either of itself, how much more surely by both together! And if by either at an ordinary degree of apparent magnitude, how much more by both together, each at an infinite apparent magnitude!*

* This very connexion between reward and punishment on the one hand, between opinion and declaration of opinion, on the other,—between reward, and the belief, or expression of belief, of a wonderful fact,—between punishment and the disbelief, or expression of disbelief,—has, in the case of supernatural facts, been urged by some as a circumstance operating in proof of the fact, and which ought to have its influence in producing on our parts a persuasion of the truth of the fact, on our observing it to be reported as true by others. In other words; the wonderfulness of a fact being given, its credibility will be *increased* by the circumstance of its having been announced as contributing to constitute the foundation of a religious system; *i. e.* of a system of commands, sanctioned by threats and promises, represented as emanating from an invisible supernatural being, as above. Increased? Why increased? For this reason: because it is the nature of this circumstance to provoke scrutiny; and to operate as an advertisement to sceptics and disbelievers to come forward and inquire into the fact, and contest the truth of it.

If adequate means and motives for the performance of such scrutiny were at hand, yes. But if not, what becomes of the security, the security for trustworthiness, thus supposed to be afforded?

In the case of a *future* fact, yes. Let it present itself as being of the wonderful cast, and let it be employed as an engine of power in the manner above mentioned, as an instrument for the support of this or that system of religion, new or old,—no doubt but the use thus made of it will have the effect of causing it to be more closely examined into, than if no such use had been made of it.

Thus stands the matter in regard to matters of fact in general, and in particular in regard to

But in the case of a *past* fact, what becomes of its tendency to promote scrutiny? Is it part of the supposition that it was *actually* subjected to such scrutiny? Applied to past facts, all supposition about *tendencies* is superseded. If it *was* subjected to scrutiny, in a word to judicial examination, produce the minutes of the examination: this done, the question whether it be likely any such examination should have taken place, would obviously be frivolous. If, on the contrary, it does not appear that any such scrutiny was performed, any such examination taken; then again the argument from tendencies assumes what is contrary to fact.

To judge of the force of this argument, take note of the securities for trustworthiness in evidence, as herein brought to view: all of them exemplified in the practice of English judicature. Take, on the other hand, the book, whatever it be, in which the system of alleged supernatural precepts, threats, and promises, is exhibited, together with the wonderful facts referred to as proofs of its authenticity. Observe which, if any, of those securities have been applied, or are represented as having been applied, to the establishment of these several facts. Take the Koran, for example, with the several wonderful facts therein reported. Whose testimony have you in proof of them? That of the writer, whosoever he were: Mahomet, his composer, or his scribe; but say Mahomet. On the occasion of this or that fact, he speaks of it as taking place in the presence of hundreds and hundreds of eye-witnesses: persons none of them likely either to have been themselves deceived, or to have harboured a wish to deceive others. Instead of hundreds, put thousands: what do you get by the multiplication? What testimony have you even now but Mahomet's? and who, at this time of day, shall cross-examine Mahomet? Instead of Mahomet both hero and historian, suppose Mahomet only the hero, and the historian a somebody else, who, having been a hero to nobody, is himself unknown. Instead of one such historian, suppose half a dozen, sometimes agreeing, sometimes disagreeing: a wonderful fact reported by one, omitted, as not being true, or not being worth reporting, omitted or reported differently, by another: not one of these histories in print, till ages after the deaths of all supposed eye-witnesses: not one of them known so much as to have been communicated in manuscript, or so

such as are improbable ; these being the only ones (and that in proportion to their improbability) in respect of which there can be any need for applying, in this partial way, the force of the will to the operations of the understanding.

What remains to be shewn is, why self-contradictory propositions,—which, when examined as above, are found to be, not improbable propositions concerning matters of fact, but propositions still less fitted to be credited upon rational grounds, —should find so much more easy and extensive evidence than propositions assertive of improbable matters of fact, even such as are so in the highest degree.

The reason seems to be, that, if duly examined, every self-contradictory proposition would be found to be an assemblage of words void of sense ; a mass of downright nonsense. But, in proportion to the apparent respectability and trustworthiness of the authority of the instructor, will be the assurance of the pupil, that, from such a source, nothing that is capable of bearing so degrading an appellation can emanate. What, in this case, he will therefore tacitly assume and take for granted, is, that under this veil of apparent nonsense there lies

much as written, till after the deaths of all possible counter-witnesses : not one of them known to have passed for ages into the hands of any other readers than what were predetermined not to institute a scrutiny into the truth of any of the wonders. And suppose the desire of subjecting the facts to the test of a judicial examination ever so strong and general among these readers : what means of carrying any such desire into effect ? Do the minutes of any such examination remain, or any trace or track of their having ever been in existence ?

enveloped some exquisite sense, too valuable to be made manifest to eyes so impure and dull as his are.

Issuing, or appearing to issue, from such a source, a proposition of this complexion will thus be upon a footing with a proposition taken from a foreign language, a language with which he has no acquaintance. From an elderly man, of good reputation, in the capacity of an instructor, suppose a young pupil to hear delivered, in the character of an uncontrovertible truth, *La illah allah, Mohammed resoul allah*. To him it would in itself be so much nonsense: to a person acquainted with the Arabic language, if a pious Christian, it would present itself as a blasphemous falsehood; if a pious Mahometan, as a sacred and fundamental truth.

Thus easy is it for a mass of nonsense, by which no matter of fact is in truth asserted, to become the subject matter of a severe and unshakeable belief: and this for the very reason that it is nonsense.

Compare, in this point of view, this nonsense, with any of those propositions which are enun- tiative of an intelligible matter of supposed fact, which we have the strongest reason that man can have for believing not to be any where realised: such as that of an old woman's moving in the air at pleasure on a broomstick, or a man's introducing his body into a quart bottle.

Though, in regard to either of these propositions, we have as full proof of its falsity, as, for the governance of human conduct, a man needs to have; it is only by a mixture of ignorance and rash confidence, that either of them could be pronounced, in the strict sense of the word impossibility, *impossible*: since, to the production of

either of these effects, there needs but the existence of some power in nature with which we are not as yet acquainted.*

True it is, that, in my view of the matter at least, the existence of any such power would be a matter completely disconformable to every thing that at present we are acquainted with, respecting the established course of nature. Of this so full is my persuasion, that, in the way of wagering, I would, for the value of a shilling, stake upon it, without scruple, every thing I possess: but, for the reason above intimated, in the consciousness I feel of my not being in possession of universal science, I find a reason altogether sufficient to prevent me from regarding it as being, in the strict sense of the word impossibility, impossible.

SECT. XI. — *Distinction between facts impossible per se, and facts impossible si alia. Of alibi evidence.*

THERE are two occasions on which the evidence, or argument, indicated by the words *impossibility* and *incredibility*, are capable of presenting themselves.

1. On the one side (say that of the demandant), a fact is deposed to by a witness: on the other side (viz. that of the defendant), no testimony is adduced, but it is averred that the supposed fact, as thus deposed to, is in its own nature incredible; or, what comes to the same thing, improbable to such a degree as to be incredible. Say, for example, a fact pretended to have taken place in the way of witchcraft: a man lifted up slowly, without

* Compare this with page 289, and the note at the bottom of that page.—*Editor.*

any exertion of will on his part, or connexion with any other, from the ground into the air; or an old woman, by an exertion of volition on her part, riding in the air at pleasure on a broomstick.

2. On the one side (say again that of the demandant), a fact is deposed to by a witness, as before: on the other hand, it is averred to be impossible, — impossible not in its own nature, as before, but for this reason, viz. that the existence of it is incompatible with the existence of another fact, which in this view is deposed to by other evidence: say the testimony of a superior number of witnesses. The defendant cannot, at the time alleged, have been committing the offence in London; for at that same time he was at York, a place above two hundred miles distant. The instance here given is that which is commonly known by the name of *alibi*. It supposes the incompatibility of a man's existing in one place at any given point of time, with the existence of the same man in any other place at the same point of time: or, in other words, of a man's existing in two places at once.

“ For the purpose of the present inquiry,
 “ these two kinds of impossibility are exactly
 “ alike. The nature of the impossibility is in
 “ both cases the same; in both cases it con-
 “ sists in disconformity to the established course
 “ of nature. The difference is, that, in the
 “ first of the two cases, there is but one event
 “ mentioned, and that event is one which, taken
 “ by itself, cannot be true; — in the second
 “ case there are two events mentioned, either
 “ of which, taken by itself, may be true, but
 “ both together cannot.

“ In the first case, therefore, the impossibility being supposed, we immediately set it down that the testimony of the affirming witnesses is false :—in the second place, we have to choose which of the two testimonies we shall disbelieve ; that of the witnesses who affirm the one fact, or that of the witnesses who affirm the other fact.

“ If I am told that, on such a day, at such an hour, John Brown leaped over the moon, I at once reject the assertion as being incredible : this is impossibility of the first kind. If A tells me, that, on such a day, at such an hour, John Brown was in London ; and B tells me, that, on the same day, and at the same hour, the same individual was at York ; I pronounce with equal readiness that both stories cannot be true, but it remains a question for subsequent consideration, which of them it is that is false : and this is impossibility of the second kind.”*

The plea of alibi, although the fact should be regarded as established by satisfactory evidence, will not always be regarded as conclusively disprobative with regard to the fact to which it is opposed. Why ? By reason of the uncertainty that may attach upon the point of time. The identity of the point of time, in the two cases, being assumed ; let it be proved, that at that time Titius was in the first floor of the house in question, it is thereby proved to be perfectly incredible, that, at that same point

* N.B. The paragraphs in inverted commas are inserted by the Editor. They appeared necessary to complete the section, which is composed of mere fragments, written at different times by the author, and which the Editor was obliged to connect together as he best could.

of time, he should have been in the second floor. But, from the size of a second or third of time, enlarge the *temporal* seat of the fact to twenty-four hours : — on that supposition, and in that sense of the word *time*, proof of a man's having been at London will not disprove the fact of his having been at York at the same time : as in the case of the celebrated flying highwayman.

Hence it is, that, in the case of the plea of *alibi*, — though, admitting the truth of the evidence in support of it, the incredibility of the fact in the character of a fact incredible *in toto* never comes into dispute, — this is not the case with it in the character of a fact incredible in degree. If it be satisfactorily proved, that, on the 1st of January 1826, at noon, Titius was in the choir of Westminster Abbey ; it is out of dispute, that, on the 1st of January 1826, at noon, he could not have been in the choir of York Minster. But if all that has been proved is, that, on the 2d of January 1826, at noon, Titius was in the choir of Westminster Abbey ; whether, on the 1st of January in the same year, at the same time of the day, he was at York Minster, is not put out of dispute : the fact of his being at York Minster on the said 2d of January, if spoken of in the character of an incredible fact, will not be spoken of as being such *in toto*, but only in degree. Titius is not said to have been in both places at once : what is said of him now is, that at the one time he was in the one place, at the other time in the other : and the question is, whether the degree of quickness with which he is said to have passed from the one place to the other, be credible, under all the circumstances of the case ?

Of the plea of alibi, the possible use is evidently without limit. It may alike be employed in penal causes and in non-penal causes. In both, the subject matter of it may be the person of the defendant, the person of the demandant, or any other person, or instead of a person it may be a thing.

But the sorts of causes in which in practice it is most in use to be employed, are penal causes : and the subject matter of which the *alibi* is most in use to be predicated, is the person of the defendant. It cannot be true, that, at the time charged, I committed the offence charged, for at that time I was in another place ; and it is not so much as charged, that, at the place where I then was, any such offence was committed by me or by any one else.

The system of procedure in which this plea occurs with a degree of frequency far beyond what is exemplified in any other, is the English : more particularly in the case of the causes belonging to the higher penal classes, in which trial by jury is employed. In these cases, for one instance in which it is true, there are perhaps some hundreds in which it is false. The cases in which it is believed, I should not expect to find so numerous as those in which it is disbelieved ; but, (setting aside the one extraordinary case), as often as it is advanced, perjury is employed in the support of it ; and, as often as it is believed, so often is that perjury successful, and guilt triumphant, and the criminal taught by experience how he may proceed with impunity to the commission of other crimes. Should the prevention of crimes ever become a primary object with the powers that be, this source of turpitude, together with so many others, might

without much difficulty be dried up: but as yet, *fiat justitia, ruat cælum*, has been the maxim: meaning by *justitia* not the essence but the forms of justice.

1. One remedy that presents itself is, the not receiving any witnesses to a point of that sort, without their coming accompanied with a certain number of persons (of whom a part to be householders), in the nature of the compurgators of the old law, to give an account of their character. There is no one, in such a country as this, be he who or what he may, who is not known to several.

An objection to this is, that there are many persons who have no good character, but who, for all that, may chance in good truth to have seen a man in one place, at the time when he is charged to have committed a crime at another. This is true; but, if the case with respect to their character be so, it is still fitting it should appear.

But he may be a stranger: either an absolute stranger, a foreigner; or a native just arrived from a distant country. But if this be the case, it is fitting it should appear: and the making it appear may be accepted in excuse for the want of compurgators. But how is this to appear? Not by the single oath of the witness himself; for he who will perjure himself in the immediate matter of the cause, where he is liable to confrontation, will still more readily do so in the preliminary matter, where he is not. The testimony, concerning him, of that person or those persons with whom he has lodged within a certain interval, should be required, in corroboration of his own: or, lastly, if he is an absolute vagabond, who has lodged nowhere,

and is known to nobody, this also, it is very fitting, should appear.

2. Another remedy might be, the requiring notice to be given to the prosecutor, a certain number of days before the trial, of the names and places of abode of such intended witnesses; a practice already established as to all evidence on the side of the prosecution, in cases of treason; a practice much less liable to abuse in this instance than in that. In treason, there is always a common cause, and a common purse: a cause which sanctifies all means, and which, moreover, sets to work all means of obtaining acquittal, with at least as much alacrity in behalf of guilt as of innocence. In ninety-nine cases out of a hundred of ordinary prosecutions, the prosecutor has no wish to impress the judge with a persuasion of the guilt of the accused, any further than he is penetrated himself with that persuasion.

3. But the only adequate remedy, and one, perhaps, which may supersede the other two, is a power in the judge, after hearing all the testimony, (but whether after or before the verdict given, may be made a question), to adjourn the trial to a further day, or, what comes to the same thing, to appoint a new one; taking such securities as the nature of the case may require, for the forthcomingness of the defendant, by holding to bail, or by recommitment. In the mean time, all such particulars as may give a clue to the discovery of the situations and characters of such witnesses will have been drawn out of them by interrogation, and the prosecutor will be furnished with such lights as may guide him to the discovery of more numerous and unexceptionable witnesses, who may prove

that the first set were themselves, at the time, in a place other than that wherein they pretended to have seen the accused; or may in some other way prove the falsity of their story.

Such a regulation being established; men who now, for the sake of hire, or an unrighteous friendship, venture upon a perjury which rarely admits of detection, as knowing that it is but bearing on, and all is over, will shrink from the thought of encountering such a scrutiny as, after such lights, if well elicited, it is scarcely possible that any thing but veracity should bear. I do conceive that the apprehension of such a scrutiny would, in by far the greatest number of those instances in which such machinations would otherwise be put in practice, prevent the attempt from being made at all, and, should it be made, from being unhappily successful.

Nor will these precautions, if rightly considered, be found to be less favourable, upon the whole, even to those at whose expense they are taken. The escaping by evidence of this suspicious kind, when unsifted and unexamined, never fails to leave a stain on a man's character, which a thorough discussion, with such assistance, would effectually wash out.

SECT. XII. — *Of improbability, as regards psychological facts.*

ON passing from physical facts to psychological facts, a change of language becomes necessary. Where physical facts are concerned, the repugnancy between the alleged fact and the facts corresponding to the law of nature from which it is considered as deviating, or of which it is considered as a violation, is

sometimes considered as existing in a degree which attaches to the alleged fact in question the character of improbability in this or that degree, sometimes in that superlative degree which stamps the alleged fact as *impossible*. In the case of the psychological class of facts, this highest degree is not considered as having any place in the scale. In such and such circumstances it is *improbable* that a man should have acted or thought so and so,—thus much is said continually: but, that in any such case the improbability should have risen to the height of impossibility, is a degree of intensity to which the assertion has seldom been raised by the utmost heat of altercation. For expressing the conformity, the uniformity, observable amongst physical facts, laws of nature have been long ago laid down, as above observed. To the purpose of denoting conformity among psychological facts, the application of that fictitious mode of speech appears not to have been ever yet extended. The cause of this difference is obvious and simple. Amongst psychological facts, no such close conformity is commonly observed as amongst physical facts. They are not alike open to our observation; nor, in so far as they have happened actually to be observed, has the result of the observation been such as to warrant the supposition of a degree of conformity equally close.

The sort of internal perception or consciousness we all feel of what is called the freedom of our will, is of itself sufficient to put a negative upon the application of any such term as *impossibility* to any of the facts which present themselves as flowing from that source. To assert the impossibility of any given act, is to

assert the necessity of the opposite act: and, in a proposition asserting the necessity of this or that act on the part of any human agent, a denial of the freedom of his will is generally understood to be involved.

Examined to the bottom, this consciousness of the freedom of our will would, it is true, be found to amount to neither more nor less than our blindness as to a part, more or less considerable, of the whole number of joint causes or concurrent circumstances, on which the act of the will, and with it the consequent physical acts, depend: nor is this the only instance of a false conception of power, growing out of impotence. But the question is, not as to what sort of expression might be best adapted to the case, but what the expression is, that is in actual use. And here too we see a further confirmation of the observation already made, viz. that it is only by a sort of misconception and verbal illusion, that such attributes as necessity, impossibility, probability, improbability, are considered and spoken of as if they were attributes and properties of the events themselves. The only sort of fact of which they are really and truly indicative, is the disposition of our mind, of our own judgment, to be persuaded, with a greater or less degree of assurance, concerning their existence or non-existence; to entertain an assurance, more or less intense, that, at the place in question, at the time in question, the fact in question was or was not in existence.

Physical improbabilities, facts rendered incredible to enlightened minds by their deviation from the course of irrational nature, have seldom of late years come upon the carpet in

any court of judicature. The alleged improbabilities, which, on that theatre, are so much more frequently brought forward and opposed to direct evidence, are of the psychological or mental kind. Alleged or supposed acts or states of the mind :—consciousness or non-consciousness of this or that fact ; recollection or non-recollection ; intention or non-intention ; operation or non-operation of the idea of this or that pain or pleasure, in the character of a motive ; conduct of such or such a description, under the influence of such or such an intention : — any of these acts or modes of being are alleged as having exhibited themselves in the mind of some individual, in circumstances in which, to an unbiassed mind, judging from the known constitution of human nature, the existence of such alleged phenomena would present itself as incredible. *Inconsistencies*—inconsistencies in thought or action — is the denomination in common use, under which these psychological improbabilities may perhaps with sufficient propriety be comprised. By the improbabilities of this description with which a narrative appears pregnant, it will frequently lose its credit ; if not as to the entire substance of it, at least as to the particular points to which the improbability appears to extend : the credibility of it will in this case be said to be overthrown by its own internal evidence, without its being capable of being supported, or requiring to be opposed, by any external evidence.

In cases of this description, the apparent improbability, as in the above-mentioned physical cases, will be susceptible of an indefinable multitude of gradations. Insanity may be con-

sidered as marking the highest point in this scale. According to the degree, in each case, will be the force with which it acts against the direct evidence, the persuasive force with which it operates upon the mind of the judge. Such as its relative force is, in each instance, such, in that instance, will be its effect. In one instance, it will prevail over the direct evidence, and the direct evidence will be effectually discredited by it: in another instance, the decision will be governed by the direct evidence; though, in proportion to the apparent improbability, it is but natural that the persuasion on which the decision is grounded should be lowered and weakened by it.

To class these cases of psychological improbability under heads, each head being illustrated by apposite examples taken from the most remarkable causes that have been determined, on questions of fact, among the most enlightened nations, would be a work of considerable curiosity; and, notwithstanding the impossibility of marking out and distinguishing the different degrees and shades of improbability, would be of no inconsiderable use. But the task would be a work of itself, too laborious, as well as voluminous, to be comprised within the limits of the present work.

The advances that, within the few last centuries, have been made in the study of these psychological laws of nature, — these advances, though not so describable, nor perhaps so considerable, as those made in relation to the physical laws of nature, have, however, been by no means undiscernible in their effects. To weigh evidence against evidence, — to weigh particular

evidence against general probability,—requires a proportionable skill in the science of psychology. It is to a deficiency of skill in this useful science, accompanied with a consciousness of this deficiency, that the system of procedure may ascribe so many altogether inapposite or imperfect and now exploded contrivances for the investigation of legal truth: trial by ordeal, trial by battle, wager of law, oaths expurgatory and suppletory.

To the same cause may moreover be ascribed those defects which may still be observed in such abundance in the system pursued with respect to evidence among the most enlightened nations. To investigate these defects, step by step, is the direct object of the present work: but, in the mean time, a presumptive only, but not unimpressive, proof of their existence, is the diversity of the courses pursued on this ground, as between nation and nation, in the pursuit of the same end; and not only as between nation and nation, but between province and province; nay, between court and court, in the same nation and the same province.*

* As it was before remarked, that there are two kinds of physical improbability, so there are two corresponding kinds of psychological improbability. An alleged psychological fact may be improbable in itself, that is, improbable because incompatible with the ordinary course of nature; or it may be improbable, because incompatible, in a greater or less degree, with some other fact which has been established by independent evidence; for instance (in the case of delinquency), with the character of the supposed delinquent.

What is said in this section on psychological improbability is equally applicable to both these species of it. Several of the modifications of the latter species have been treated of at considerable length in the former part of the present book.—*Ed.*

CHAPTER XVII.

ATROCITY OF AN ALLEGED OFFENCE, HOW
FAR A GROUND OF INCREDIBILITY.*

A CRIME is the more improbable (it has been said), the more atrocious; and the practical inference is,

The more atrocious the offence, the greater the force of evidence requisite to prove it.

Thus nakedly given, as we see it frequently, without the requisite explanations, the observation is fitter for a play or a novel than for a treatise on jurisprudence. It proceeds from an indistinct view of the subject; and, in respect of the practical conclusions pointed at, it requires explanation, and distinctions to be made, to prevent it from being productive of pernicious errors in practice.

The imputation is an incredible one: Why? Because the man on whom it is cast bears so excellent a character:—such is the argument, in the case mentioned in a preceding chapter. The imputation is an incredible one: Why?

* This has appeared to the editor to be the most proper place for the present dissertation; which clearly belongs to the head of psychological improbability, though apparently not intended by the author to serve as an illustration of the probative force of the species of evidence indicated by that term.

Because he is a man:—such is the argument in the present case. This is what is called sentiment, and being so, is addressed, it is said, to the heart.

The depravity of human nature, and the dignity of human nature, are among the topics on which the practitioners in the arts of rhetoric (that is, of deception) have been fond of skirmishing: some on the one, others on the other, some on either or both, according to the purpose.

Of a man who brings forward this observation, the first question to be asked is, what he means by *atrocious*? But this is that sort of question which the sort of writer in question takes care not to put to himself; his readers would not thank him for it. Nothing is more troublesome to a man, than to be obliged to know what he means: no error so pernicious, that he would not rather adopt and give currency to, than load himself with so much trouble. To explain or to inquire what it is a man means, is metaphysics. Light is an object of hatred to all owls and to all thieves; definitions, under the name of metaphysics, to all rhetoricians. “I hate metaphysics,” exclaims Edmund Burke, somewhere: it was not without cause.

What then is, on this occasion, meant by *atrocious*?—the atrocity of the offence—no, not of the *offence*; that would not be sentimental enough:—of the *crime*. The word *crime*, being incurably indistinct and ambiguous, is the word to be employed upon all rhetorical occasions.

Does it mean the *mischievousness* of the offence? If it does, the proposition is in a

great degree erroneous. Of all offences, by far the most mischievous are those which owe their birth, or tend to give birth, to civil war: treason, rebellion, sedition, and the like. Suppose a civil war: subject of dispute, title to the throne; question on which the title turns, legitimacy. The nation is equally divided: to-day, one half are traitors; to-morrow, the other half. Whichever half is, for the time being, on the unsuccessful side, and composed thereby of seditionists, rebels, traitors, it is on that side that you find the most disinterested, the most generous, the most heroical of mankind. If, then, by atrocity we mean mischievousness, the proposition, that an offence is the more improbable the more atrocious it is, is not true.

By *atrocious* is not unfrequently, perhaps most frequently, meant, neither more nor less than *odiousness*; meaning of course by odious, that which is so (no matter for what reason, no matter whether with or without reason) to the individual by whom the appellation is employed: in a word, that which is the object of his antipathy. To one set of men, the man who differs from them in some peculiarly tender point bearing relation to religion, is the most atrocious character; to another, or to the same, the man who has been drawn into some devious path by the impulse of the sexual appetite. The existence of the Christian, the Theist, the Atheist, I have thus heard successively denied by their respective abominators. In printed books I have observed doubts, next in force to denial, expressed with relation to the existence of those non-conformists who, in company with the wearers of linsey-woolsey, are consigned to

destruction in the second edition of the Mosaic law. All passions are cunning; antipathy not less so than any other. On the part of the antipathist, the profession of incredulity is but a pretence and a disguise, to enable him with more decency to give vent to his rage, and with more effect to point the rage of others against the odious object. If the existence of these monsters is so incredible, the practical consequence should be, not to be so ready to devote to perdition this or that individual, under the notion of his being one of them. But the antipathist knows better than to be thus cheated of his prey. The existence of the monster is to be incredible, or next to incredible, for the purpose of rendering him proportionably odious. The odiousness, being the medium of proof for the demonstration of the improbability, is assumed of course; and, forasmuch as an attempt to prove supposes the necessity of proof, and assumption the non-necessity of proof, assumption of a fact is still more persuasive than the strongest proof of it. To screw up the odium against a man to the highest pitch, you begin with declaring his existence, the existence of so odious a character, next to impossible: having thus pointed against him the rage of the judge, you make use of that rage for disposing the judge to believe him guilty. While Louis XIV. was persecuting the Huguenots, it was an established maxim, a fiction of French law, that there were no such persons in existence.

By *atrocitiy* may, again, be meant *cruelty*—cruelty displayed in the commission of the offence. This sense is, of all, the most literal and

proper sense. But, if the import given to the word *atrocit * is thus confined, the application of the maxim, the description of offences to which it is applicable, is proportionably confined. It is almost confined to personal injuries, homicide included. If wilful destruction by fire or water be included, it will be either because homicide, or the imminent danger of that mischief, and upon a large scale, are involved, or because, in its application to property, the amount of the mischief or danger is so indefinitely extensive.

Consider, then, the maxim in this sense. In the case of an offence characterised by cruelty, the seducing motives have to contend with the motive of humanity, sympathy, general benevolence (take which name you will): to contend with it in its character of a restraining, a tutelary motive.* The disposition of the individual in question being given (that is, the effective force with which it habitually acts upon his mind); the greater the degree of cruelty said to be displayed in the offence said to be committed, the greater the force with which, on that particular occasion, the motive in question must have opposed the perpetration of it.

But the principle of humanity is but one of several principles, which, on every such occasion, are acting upon the human mind, in the character of tutelary and restraining principles. There are, besides this, the three respective forces of the political, the moral or popular, and the religious sanctions. Neither is this by

* "Introduction to Morals and Legislation." Chap. X
MOTIVES.

any means the most intense and uniform in its operation, of the four tutelary forces. It may or may not be stronger than the force of the religious sanction; it may or may not be stronger than that of the moral; but it never can be accounted comparable in strength to that of the political sanction. Many men fear the wrath of Heaven; many men fear loss of character: but all men are acted upon, more or less, by the fear of the jail, the scourge, the gallows, the pillory, and so forth. In this point of view, whatever improbability is given to the supposed offence in question by those other restraining motives, the additional improbability given to it by the circumstance in question seems scarce worth taking into the account.

On the other hand stands a circumstance which must not be overlooked. The force of the political and moral sanctions acts upon a man in the character of restraining motives, only upon the supposition of discovery. The force of humanity has this in common with that of the religious sanction, that the supposition of discovery is not necessary to the application of it; and, besides the comparatively greater extent of its operation when contrasted with the religious sanction, the principle of humanity (whatever may be the force with which it acts), is surer to be present to the mind. The suffering, of which the injury meditated threatens to be productive, can scarcely fail to be present to the mind of the offender, especially where the pleasure of enmity, the pleasure expected from the suffering of the intended victim, constitutes the motive to the offence. This is what cannot fail to be in a man's thoughts; whereas

the fear of God may be altogether out of his thoughts.

But whatever may be the degree of cruelty displayed in the commission of the offence, or even on whatever other score it may appear psychologically improbable, a most material consideration is this. Supposing the imputation unfounded,—does the innocence of the defendant import, as of necessity, consciousness of such innocence (and consequently mendacity, criminative perjury) on the part of any person in the character of an accusing witness? If yes, the presumption operating in favour of the defendant from this source seems completely destroyed by the counter-presumption in favour of the witness. For (as there will be more occasions than one for observing) with the exception of the imaginary offences invented by superstition, there is no offence so improbable (because in practice so unfrequent) but that the offence of him who by criminative perjury seeks to fasten upon another the imputation of that offence, is still more so. Thus, if (for example) it be always improbable that murder should be compassed in any of the ordinary ways in which that crime is perpetrated; it seems at least as much so, that it should (which it would be by a false accusation of that crime) be so by this hazardous expedient of calm and deliberate malignity.*

* An exception is to be made respecting those times when the contagion of some extraordinary fanaticism has given to certain accusations, well or ill founded, the colour of virtue; at least, has indisposed the people against the ordinary expedients for sifting out their truth; and when the end to be com-

Within the compass of the last and present century, the number of persons who have committed robberies has been many thousands: but there will scarce be found ten who have given false evidence of that or any other capital crime.

There remains, therefore, for the only case in which this maxim (whatever may be the force and value of it) can have any application, that in which the evidence operating in crimination of the defendant is purely of the circumstantial kind: unless it be worth while to add those sorts of offences (witchcraft, and so forth) which are not capable of being rendered probable by any quantity of testimonial evidence.

What degree of exculpatory force may be proper to be given to the circumstance thus denominated, will rest for a judge to determine, upon a review of all the other circumstances belonging to the case.

The essential practical consideration, the essential warning, is this: not to think of employing it as the foundation for any inflexible rule, requiring, as necessary to conviction, this or that particular dose of evidence: such as the testimony of two witnesses, the confession of the defendant, or, in a word, any other determinate mass of criminative evidence.

passed by their taking effect is looked upon to be of such importance, as to sanctify almost any means. Such were the times of epidemical perjury and Titus Oates.

EVIDENCE.

BOOK VI.

OF MAKESHIFT EVIDENCE.

CHAPTER I.

OF MAKESHIFT EVIDENCE IN GENERAL.

SECTION I.—*Makeshift Evidence, what.*

THUS much concerning that description of inferior evidence, the inferiority of which consists in this, viz. that the fact, the existence of which is immediately indicated by it, is not the very fact in question,—the fact, of the existence of which, a persuasion is endeavoured to be produced in the mind of the judge,—but some other fact, which, though distinct from that principal fact, is so connected with it, as that (with a greater or less degree of assurance) the existence of such principal fact is *inferred*, and considered as being rendered more or less probable by the existence of the evidentiary fact.

We come now to that description of inferior evidences, the inferiority of which consists in this, viz. that, be the fact what it may (principal or evidentiary), the information which it conveys

has some circumstance belonging to it, which, — by rendering inapplicable to it some one or more of the securities that are applicable to ordinary evidence, — renders its probative force in a greater or less degree inferior to that possessed by ordinary evidence when those securities (such of them as are applicable to it) are actually applied to it.

Of the different powers, qualities, and operations, serving as securities for correctness and completeness, — securities against deceptitious incorrectness and incompleteness, — a view has been already given. By the inapplicability or non-application of these several securities, and the groups which, by ringing the changes, might be formed out of them, may be constituted so many species of evidence of inferior shape; — of evidence, the probative force of which is lessened by the imperfection thus produced in the shape in which it presents itself to the mind to which it belongs to judge.

When the non-application of them has for its cause the mental weakness or corruption of the man in power — of the legislator or the judge, — the principal of the shapes in which this imperfection has displayed itself, have, under the head of *Extraction*, been already brought to view.

But cases exist, — and cases the exemplification of which is abundantly frequent, — in which this imperfection has for its cause, not any failure on the part of the man in power, but the unchangeable nature of things. In the imperfect shape in question, the article of evidence is to be had; in any other shape it is not to be had, at least as matters stand at present.

Agreeing in this one common character, viz. that of *imperfection*, and of imperfection the origin of which is traceable to the source just indicated; being employed only because, from the same source, better evidence, evidence of a more trustworthy complexion, of greater probative force, is not to be had; these several species of evidence, how dissimilar soever in other respects, may be brought together and designated by one common appellation, viz. that of *makeshift* evidence.

On this subject, three distinguishable tasks present themselves to the eye and conscience of an honest and intelligent legislator:—1. To take an inventory of those species of inferior, yet not the less indispensable, evidence; 2. For the information of the judge, to hold up to view their several features of infirmity; and 3. By apposite powers and instructions, to do whatsoever the nature of things admits of, towards the removal of their several infirmities, by completing in each instance the requisite assortment of securities; or by so ordering matters that testimony in a more trustworthy shape may in future take place of testimony in these less trustworthy shapes.

SECT. II. — *Of the different species of makeshift evidence.*

UNDER the denomination of makeshift evidence are comprehended two divisions or subclasses, the contents of which, as compared with one another, have nothing in common, except the infirmity in consideration of which the term *makeshift* is alike applicable to both.

These are, unoriginal evidence, and extra-judicially written evidence.

I. *Extra-judicially written* evidence. Susceptible alike of this common denomination will be found three sorts or genera, viz. 1. Casually-written; 2. *Ex-parte* pre-appointed; 3. Adscititious or imported.

II. *Unoriginal*, or (as supposed) transmitted evidence. Susceptible of this common denomination will be found five distinguishable sorts or genera: 1. Supposed oral, delivered through oral; 2. Supposed written (or say scriptitious) delivered through written (or say scriptitious), thence termed transcriptitious or transcriptural; 3. Supposed oral, delivered through written; 4. Supposed written, delivered through oral; 5. Reported real evidence.

The different modifications, for the expression of which, these denominations have been devised, will all of them receive further explanation, each of them in its place.

In every instance, that inferiority in respect of probative force, in consideration of which the term *makeshift* was found applicable with equal propriety to them all, will be seen to have for its cause the absence of one of the principal securities for correctness and completeness; viz. interrogation *ex adverso* at the hands of a party, whose interest, in the event of its being incorrect or incomplete, may, in proportion to that incorrectness or incompleteness, be made to suffer by it.

In the case of unoriginal evidence, the word *supposed* forms, in the instance of each of the genera contained under it (as above), an indispensable adjunct. If not expressed, it must at

any rate be borne in mind, or confusion and misconception will be the result.

In the case of every such article of evidence, there are at least two different statements in question: one, the existence of which is certain; the other such that, though the existence of it is asserted (*viz.* in and by the statement which, as above, is certainly known to exist), it may happen, notwithstanding, in the whole or in any part, not to have had existence.

That which is certain, is that which, to a certainty (*viz.* by the very supposition), is presented to the mind of him to whom it belongs to judge: to his hearing, if it be oral; to his sight, if it be scriptitious.

Titius, standing before the judge, says, "I heard Sempronius say so and so." This is supposed oral through oral evidence. The oral evidence is that which is said by Titius: the supposed oral evidence is that which by Titius is said to have been said by Sempronius. By the judge it will naturally be supposed to have been said by Sempronius; because, generally speaking, it will be more likely that what was said by Titius was true, than that it was false. But, in speaking of this supposed statement, to employ the same unqualified expression as that which (as above) is employed in speaking of the statement made before the judge, would be to assume as indisputable that which, in general, will, in case of litigation, be among the matters in dispute. That, in the presence of the judge, Titius said to the judge, "Sempronius said in my hearing so and so," is out of dispute. But what may happen is, that, in saying thus, what Titius said was altogether

false ; Sempronius not having, in his hearing, ever said any thing at all, or at least not having said any thing to any such effect.

Omitting the adjunct *supposed*, had the denomination been, in this case, oral evidence through oral ; in this case, the truth of what was supposed to have been said by Sempronius would not, indeed, have been represented as out of dispute ; but the truth of that which was said by Titius, in saying, “ Sempronius in my hearing said so and so,” would have been represented as being out of dispute : whereas, in the nature of this species of evidence, this point is no less open to dispute than the other.

Of the three sorts of evidence here comprehended under the general denomination of extrajudicially-written evidence, the points of coincidence and difference may be thus stated:—

Whatever a man writes that is capable of being employed in evidence, but without any expectation (unless with a fraudulent intention) of its being so employed,—if, being addressed to any other person, it is designed to be communicated to him,—comes, in common language, under the denomination of a *letter* ; if it be not so addressed, it may be, and is, included under that of a *memorandum*.

In both cases, if it happens to the document to be employed in the character of judicial evidence, it may be designated by the common appellation of *casually-written* evidence.

But there are cases in which, — not wearing the form of evidence, nor, as such, antecedently to their creation, called for by authority of a court of justice, — letters, as well as memorandums, are written for a purpose analogous

to that for which evidence is so called for; that is, for the giving effect to rights and obligations; and not altogether without a view towards their being made (in so far as the established rules respecting evidence will admit) subservient to the purposes of evidence.

Of this genus, the most striking, and, in respect of their extent and application, the most important species, are,—in the shape of memorandums, all those entries which form the matter of a mercantile book of account; in the shape of letters, those which are written or received by mercantile men, in the course or for the purpose of their commerce.

These, therefore, being written not without a view to their being eventually made subservient to the purposes of evidence, may appear in that consideration to rank themselves under the head of *preappointed* evidence. But, not being endowed with either of those qualities, by one or other of which whatsoever has been ranked under that head stands distinguished so much to its advantage, (viz. the being produced by the concurrence of every party whose rights would be injured either by spuriousness or by any deceptitious incorrectness or incompleteness in its tenor; or else by some party whose situation, bating casual fraud, places him out of all danger or suspicion of any sinister interest capable of engaging him in the design of giving to it any such deceptitious character,)—it becomes necessary that this inferior sort should, by a term expressive of the distinguishing circumstance, be distinguished from that superior sort of evidence. It has, therefore, been called evidence *preappointed ex parte*.

By the term *adscititious* or *imported* evidence, is meant to be expressed, any statement in writing, which, on the occasion of its being written, was *not* designed to be employed in the character of evidence in the cause in question, but *was* designed to be employed (whether actually employed or not) in the character of evidence, viz. in some other cause: and it is with reference to such other cause that it is termed *adscititious* or *imported*, as having, for the purpose of the cause in question, been borrowed (as it were) from that other cause.

In the case of evidence borrowed from another cause, it may happen that some or all of the appropriate securities for the trustworthiness of evidence were applied to it in that cause. But it will scarcely happen that a set of securities was applied to it, the same in all respects as that which, in the cause in question, might be applied to it. Interrogation, for example, yes: but not at the instance of all the same parties; or, even if at the instance of every one of those same parties, yet one or more of them, perhaps, were not at that time possessed of all the material sources of information, and consequent grounds for interrogation, which they possess at present.

This is the most favourable case. But, in respect of probative force, this species of evidence, (which at the worst seems to have all the advantages of both the extra-judicially written species of evidence just mentioned), may be rendered by any number of degrees weaker and weaker, by the several defects which, if the judicatory be different, are liable to have place in the course of procedure pursued

in such other judicatory, in relation to evidence.

With imperturbable composure we shall see judges after judges employing (and in the English system, which judges shall we not see employing?), and taking for the sole grounds of decision, modes of collection, of the unsuitableness of which to the purposes of justice, they are themselves, and ever have been, perfectly and confessedly convinced : — evidence altogether uninterrogated, in the shape of *affidavit* evidence: evidence interrogated, not by any of the parties, nor yet by a judge, but by a clerk, who, being alone with the witness in a private room, makes him sign what he pleases. Under these circumstances, supposing the procedure of the judicatory directed to any such ends as the ends of justice, it may be imagined with what varied degrees of distrust it cannot but regard whatever masses of evidence may have been imported into it from any of those judicatories in which the convenience of the judge is substituted to the ends of justice.

Aliâ in causâ — inter alios — alio in foro — alieno in foro : by these adjuncts, an idea may be given of so many obvious specific modifications of the genus *adscititious* evidence.

Casually-written evidence ; evidence preappointed *ex parte* ; and *adscititious* evidence ; these form as it were a class apart from that for the designation of which the term *unoriginal* is employed. Not but that evidences, partaking of the qualities in consideration of which they have been designated respectively by those several denominations, are capable likewise of partaking of that quality for the designation of

which the word unoriginal is employed. Not that casually-written evidence, evidence pre-appointed *ex parte*, and the evidence termed adscititious evidence, are less capable than any other sorts, of adding to the qualities designated by those several appellations the quality of unoriginality; in which case they will add, each of them, to its own characteristic infirmity, the infirmity that forms the character of that fourth species. But, of all evidence here comprized under the appellation of unoriginal evidence, this of non-originality constitutes an essential and inseparable quality: whereas in those several other cases, if it be present, it is but as an accidental one.

SECT. III. — *Properties common to all the kinds of makeshift evidence — Topics to be touched upon in relation to each species.*

OF every one of the several objects comprehended (as above) under the common denomination of makeshift evidence, the following propositions seem capable of being predicated with equal truth:—

1. Of the information respectively conveyed by them, the truth has not been provided for by any, or at least not by all, of the securities, which (as above) are capable of being, and ought to be, applied to evidence, ordinary evidence, when presented in its best shape.

2. The shape in which the information contained in them is presented, renders them respectively inferior, in point of trustworthiness, to ordinary evidence.

3. By the circumstance by which they are

respectively distinguished from ordinary evidence, each of them is liable to have been employed as an instrument of a particular species of fraud: a particular modification of what, in speaking of all or any of them, may be termed the *characteristic fraud*: the characteristic fraud incident to makeshift evidence.

4. This fraud consists in the fabrication and utterance of the evidence, the pretended information, in question,—in contemplation, and under the assurance, of the inapplicability or non-application of the securities for trustworthiness; viz. sanctionment, or interrogation, one or both of them.

5. Though the more formidable part of the mischief is composed of the deception and consequent misdecision of which the characteristic fraud may be the instrument, it is not the whole: since, for want of the security afforded by the safeguard in question against incorrectness and incompleteness, the same evil consequences may take place through temerity, or even without blame.

6. They are all of them indicative of the existence (present, or at least past) of ordinary regular evidence, such as is, or at least at one time was, or ought to have been, obtainable in the best shape from the same source: *i. e.* either from the same thing (as in case of *real* evidence), or from the same person (as in case of personal evidence).

7. They are, therefore, unless for special causes, not fit to be admitted, any of them, by itself, in its essential shape: the information conveyed by them is not fit to be admitted, unless, being drawn from the same source, it be

presented (provided it be capable of being so presented) in the ordinary, *i. e.* in the superior and more trustworthy, shape.

8. The information respectively contained in them may, in such its inferior shape, be presented, and by itself, if in its regular and ordinary shape the presentation of it is either altogether impracticable or not practicable without preponderant inconvenience, viz. in the shape of delay, vexation, or expense.

9. By and after the indication and warning thus given of the characteristic fraud of which they are respectively liable to become the instruments; if it be in the *will* as well as in the *power* of the judge to possess himself of it, the danger of deception by means of such fraud is lessened: the probability of succeeding in any attempt, and thence the probability of the attempt itself, is diminished.

Shall it, in any and what cases, be admitted? The danger of deception attached to the admission of it, can it, by any and what means, be diminished? Such are the subjects of inquiry which present themselves as proper to be considered in relation to each of the several species of makeshift evidence hereinabove brought to view.

Previous explanation of their respective natures and sub-modifications, will, in so far as deemed necessary, come in of course.

CHAPTER II.

OF EXTRAJUDICIALLY WRITTEN EVIDENCE.

SECT. I.—*Of casually-written evidence.*

To a private letter or memorandum this appellation is applied, for the purpose of distinguishing this from other species of written evidence, widely different in point of trustworthiness, viz. preappointed written evidence at large, and judicially-written evidence; to which last belong, ready-written evidence delivered spontaneously; ditto delivered *ex interrogato*, (delivered in the epistolary form, on being called for by interrogation in the same form); and evidence judicially delivered in the oral form, whether spontaneously or *ex interrogato*, and thereupon forthwith consigned to writing on the spot.

Evidence preappointed *ex parte*, though extrajudicially, can scarcely with propriety be said to be *casually* written; it being written for particular purposes, and those always uniform in their nature.

Of the characteristic fraud, as above considered under a general aspect, the particular modification of which extrajudicially and

casually written evidence is liable to become the instrument, may be thus described :—

Under the assurance of not being exposed by it to punishment, (no punishment being, in case of mendacity, attached to it, through the medium of an oath, or otherwise), nor yet to ill repute, or at any rate not of the degree of public shame, the author not being about to be subjected to interrogation in respect of it; a man utters in this form a fallacious statement, adapted to a deceptitious purpose. It is either incorrect, or incomplete, or both; incomplete in the way of partiality, and thereby calculated to produce deception, and misdecision in consequence.*

Fraud is not the only source in which the inferiority of extrajudicially-written evidence, as compared with ordinary evidence judicially extracted from the same source, is to be looked for. Neither of the main securities against incorrectness and incompleteness, neither the fear of eventual punishment in case of falsehood, nor the scrutiny of interrogation and counter-interrogation, have been applied to it. Without other blame than that of temerity, or even without any blame at all, both sources of deception, incorrectness and incompleteness,

* Objection.—If such be the design of it (it may be said), the epithet *casually-written* cannot with propriety be applied to it. Answer.—The denomination here given to this species of evidence, considered in the aggregate, is taken from the consideration,—not of what, by fraud, it may, on this or that particular and rare occasion, happen to it to be,—but of what in its ordinary condition it is, and what even in the extraordinary case of fraud it purports to be; for, in case of fraud, if known to be directed to the object to which in that case it really is directed (viz. that of operating in the character of evidence), the object of it would be by such knowledge frustrated.

more particularly incompleteness, may therefore have crept into it.

Whose is the discourse which it conveys, or purports to convey? That of an extraneous witness, or that of a party in the cause?

If that of a party, at whose instance is it tendered or called for? That of the party whose discourse it is? or that of another party on the same side? or that of a party on the adverse side?

According as it happens to it to stand in one or another of these different predicaments, the propriety of giving admission to it will (it is evident) stand upon a different footing; as well as, in case of admission, the expedients to be employed for reducing the danger of deception, and consequent misdecision, to its lowest terms.

In what case, if in any, shall evidence of this description be admitted?

When admitted, by what expedients may the danger of deception, considered as producible by the admission of a species of evidence thus liable to be vitiated by incorrectness and incompleteness, be diminished?

To provide an answer to the above questions, is the object of the following rules.

I. Case the first. He whose discourse the script appears to be,* not a party in the cause:

* A more natural as well as concise mode of designation would have been to say, *the writer*, or *the author*. But what may have happened is, that he whose discourse it is was not the writer of it, as in the case of dictation or transcription: and, by the word *author*, the conception is apt to be exclusively directed to a long and studied discourse; whereas the roughest and minutest scraps are capable of being produced in this character, and in practice are actually so produced: besides that who the real author is, is a point not always ascertained, or even ascertainable.

the evidence, therefore, which it contains, *extraneous*.

Rule 1. Except in the cases excepted in the next rule, admit it not.

Question. Why not admit it?

Answer. Because, by excluding it, (deduction made of the cases in which it is proposed to give admission to it), no information stands excluded. The person whose discourse it purports to be being forthcoming and interrogable in a mode less exposed to incorrectness and incompleteness, it rests with you to obtain whatever information it contains, and more. Read by itself, he not forthcoming or not interrogated in respect of it, the substitution will naturally be a cause of incorrectness and incompleteness, and misdecision the more or less probable consequence : he interrogated, and this supposed written discourse of his read notwithstanding, the addition is superfluous ; inconvenience, in the shape of delay, vexation, and expense, all useless, the certain consequence.

Rule 2. The evidence extraneous as before, in the following cases admit it :

1. On him whose discourse it purports to be, the process of interrogation (*viz.* oral interrogation) rendered either physically or prudentially impracticable : physically, as by death or incurable mental infirmity ; physically or prudentially, as by expatriation or exprovinciation : the interrogation effectible either not on any terms, or not without preponderant inconvenience in the shape of delay, vexation, and expense.

2. On him whose discourse it purports to be, the process of interrogation performable and performed ; the reading of it called for on either side, *viz.* either for an infirmative or a

confirmative purpose ; for the purpose of shewing that, at the time of framing the written discourse in question, the statements contained in it were in any point discordant, or on the whole concordant, with the testimony now, by interrogation and counter-interrogation, extracted from the same source.*

Question. Why give admission to evidence in a shape thus liable to be vitiated by incorrectness and incompleteness ?

Answer. Because, were it excluded, whatsoever information were not attainable from any other source would thereby stand excluded. Here then, supposing that the information is necessary to a decision in favour of that side, here would be deception, and consequent misdecision, to a certainty : whereas, by admission given to it, certainty of being credited would not be given to it, even supposing it true ; still less, supposing it false. Not being (unless in case of fraud, which is comparatively an improbable case) framed for the purpose ; the probability is, that, taken singly, how correct soever, it will be (in relation to the whole of the facts in the cause taken together) more or less incomplete ; that, accordingly, it will be composed, in great part, if not in the whole, of circumstantial evidence ; and since, without danger or suspicion of danger, circumstantial evidence is received, how slight soever, how weak soever, its proba-

* In a preceding book, mention was made of memory-assisting memorandums. Employed for that purpose, they would require to be under the eye of the deponent, during and antecedently to the time of the delivery of his evidence : applied to the purpose here in question, they would require to be kept out of his sight till after the delivery of his evidence

tive force; so, therefore, may evidence of the description here in question, not to speak of any other.

Note, that, if the species of makeshift evidence here in question be incorrect or incomplete, to the degree of utter or material falsity, it will of course be counter-evidenced by the direct and strenuous evidence of the party against whom it operates.

Instruction to the judge for avoidance of deception, considered as producible by the observance of rule second in the first of the two cases therein contained:—

It will on this occasion be matter for inquiry, whether, at the time of the utterance of the written discourse in question, he whose discourse it is was not exposed to the action of some interest, of a pecuniary or in any other way of a self-regarding nature; and whether his interest did not at that time stand connected, by some special tie of dependence or affection, with the interest of the party by whom, in the character of evidence, the paper in question is produced; and this in such sort and degree (the quantum of profit being moreover taken into consideration) as to render the practice of the characteristic fraud more or less probable in this case.

A book-keeper,* for example, charges with goods a customer or supposed customer of his master's, knowing that by the person so charged

* This is an instance taken from *ex parte* preappointed evidence; but it is equally good as an illustration of the application of the characteristic fraud to casually-written evidence also.

the goods were neither received nor ordered. The book-keeper (not to speak of death, an event not likely to have been intended) ceases, viz. by expatriation or exprovinciation, to be forthcoming for the purpose of justiciability. Joined to the fabrication of the written document,—the expatriation or the exprovinciation, may it not have had for its cause the design of putting the undue profit into the pocket of the master? The testimony delivered by the paper is incorrect, to the degree of total falsity; and the falsehood is endeavoured to be screened from detection, by the non-interrogation of the author: while the author himself is effectually secured from punishment, by his non-forthcomingness, and that non-justiciability which is the result of it.

In a case of this sort, against the probability of the characteristic fraud, note this dilemma. If the claim (the unjust claim for the support of which it was designed) be made soon after the fabrication of the evidence, the expatriation or exprovinciation must have taken place in the mean time; and, being so timed, the non-forthcomingness of the fabricator will operate in the character of circumstantial evidence, giving probability to the supposed actual fraud:—if the claim be not made till long after, the non-demand for such a length of time is another article of circumstantial evidence, pointing the same way. And here, as above, note, that this disprobabilizing circumstantial evidence will be seen to have for its support the direct testimony (if received, as it ought to be) of the party against whom the fraud in question operates. And not only the particular account-book in

question, but all the others kept by the same dealer, will be, or at least ought to be, producible at the instance of the party so charged.

II. Case the second. He whose discourse the script appears to be, a party in the cause; the person at whose instance it is called for, a party on the opposite side; the tendency of the evidence consequently *confessorial*, or otherwise self-disserving.

Rule 3. In this case, let the script be admitted; but upon condition that the party, on recognizing the discourse as his, shall be at liberty to deliver his own testimony (subject to interrogation) in explanation of it.*

Question 1. Why give admission to evidence of this description, thus liable to be rendered, in respect of incorrectness or incompleteness, an instrument of deception?

Answer. Because, in so far as its tendency is to operate against him whose discourse it is, (*i. e.* in so far as its tendency is *confessorial*), it is the most trustworthy and satisfactory species of evidence that can be produced; no person being so little in danger of prejudicing a man in this way (either purposely, through mendacity, or heedlessly, through temerity) as the man himself; and that the tendency of it (true or false, justly or unjustly) is not (in the opinion of the person best qualified to judge) to operate to the prejudice of him by whom it is called for, is sufficiently proved by the circumstance.

Question 2. Why annex as a condition, that

* Interrogation, viz. in the oral mode, or in the epistolary mode (where the epistolary mode is allowed), or in both, according to the circumstances of the case. See Book III. EXTRACTION.

at his own instance he may, subject of course to interrogation, be admitted to testify in explanation of it?

Answer. Because evidence of this description is in a particular manner liable to be, if not incorrect, at any rate incomplete. To admit it to receive explanation, is to allow what misstatements it may contain to be corrected, what deficiencies it may contain to be supplied. To refuse to it the faculty of receiving such explanation, is to keep it, by force of law, in a state, the tendency of which is to produce deception, misdecision, and injustice.*

Rule 4. Although, by death or other cause (such as incurable infirmity of mind, or expatriation), he whose discourse this self-disserving testimony is, be incapable of testifying in explanation of the script; admit it notwithstanding.

Question. Why admit it, under the danger of incorrigible incorrectness and unsuppliable incompleteness, as above?

Answer. First, because the danger of misdecision *for want* of information, in case of exclusion put upon the evidence thus circumstanced, appears in this case to be preponderant over the danger of misdecision *by reason* of information rendered deceptitious for want of such explanation as, had the party been forthcoming, it might have received. Suppose the information necessary, to warrant a decision in favour of that side,—from the exclusion of it, misdecision takes place as a certain consequence; whereas, on the other hand, it is not

* Refusal of such faculty of explanation is among the rules of English practice.

certain that the information contained in it will be either incorrect or incomplete ; and, if either incorrect or incomplete, it is not so likely to be so to the prejudice of the author's side as to the prejudice of the other ; nor, though it should be both incorrect and incomplete, is it certain but that the effect of the incorrectness may be corrected, and the deficiency supplied, by *inferences*, drawn partly from the script itself, partly from whatsoever other evidence there may be in the same cause.

The safety with which admission may be given to evidence of this description, seems to be indicated by experience. Even without any such security against deception as is here proposed, self-disserving evidence is admitted in this shape—admitted without reserve—in English practice. Even thus, the mischief (though, doubtless, it cannot be unfrequent) seems never yet to have become prominent enough to have been presented as an object of notice to the public mind : much less considerable would it be, were the means of amendment suffered to be applied to it as above.

III. Case the third. He whose discourse the script appears to be, a party in the cause, as before ; but he himself the party at whose instance it is proposed to be produced : the tendency of it, consequently, self-serving.

Rule 5. In this case, likewise, let the script be admitted ; the party being of course subject to interrogation on the subject of it, and in explanation of it, viz. by interrogatories propounded on the other side, and having, consequently, the effect of counter-interrogation.

Question. Why give admission to evidence

so obviously liable, in so high and manifest a degree, to be mendacious, or (through bias or temerity) incorrect or partially incomplete, and thence to become an instrument of deception?

Answer. In the case of an extraneous witness, interest can never be, in any case, a sufficient ground for exclusion.* Moreover, in the same case, interests, as strong as any that are most apparent, may exist without being known, without a possibility of being brought to light; while, of the interest which a party has in the cause, the existence is known of course. In the case of a party, the sinister mendacity-promoting interest may in itself be no greater than in the case of an extraneous witness; and in particular in one of those instances in which, being undiscoverable, it cannot be taken for a ground of rejection. But in the case of a party, the interest, whatsoever be its effect in respect of the production of *mendacity*, is much less liable to be productive of *deception*, than in the case of an extraneous witness: because, being more manifest, presenting itself the more readily to the observation of every, even the most undiscerning, observer, the suspicion it excites will be stronger,—its probative force, consequently, weaker.

Whatsoever may be the danger, the probability, of mendacity, self-serving mendacity, and consequent deception, attached to the admission of the testimony of the party in his own behalf, deposing in the ordinary mode of oral response to oral interrogations; that danger cannot,

* See Book IX. EXCLUSION, Part II. DECEPTION. Chap. 3. *Interest.*

from the admission of a written discourse of the same tendency, though of a prior date, receive any increase : he is subject to counter-interrogation in the one case, and, by the supposition, so he is in the other. His extrajudicially composed written statement will, in his conception at least, operate in confirmation of the testimony he has to deliver in answer to interrogatories : But so, and without prejudice to his veracity or title to credence, it very well may ; especially when so it happened that, at the time of his framing it, he had not, either in fact or in prospect, any such interest as that in virtue of which he became, at a subsequent point of time, a party in the cause.

Rule 6. Although, by death or other cause (as above), he whose discourse this self-serving testimony is be incapable of testifying in explanation of the script ; admit it here also, notwithstanding.

Question. Why give admission to evidence liable, in a degree still so much higher, to be mendacious, or (through bias or temerity) incorrect or partially incomplete, and thence to become an instrument of deception ?

Answer. For the same reasons as those brought to view in support of rules 2, 4, and 5, though not operating with so great a force. In some cases, as above, it may be as well entitled to credence as evidence from any other source, and at the same time of material and indispensable use towards bringing to light and explaining the facts that have application to the cause. And in this case, as in the case mentioned under the last preceding rule, so palpable are the considerations that operate in

diminution of the probative force of the evidence, that the danger of its being estimated at a value over and above that which properly belongs to it, does not present itself as naturally preponderant.

No doubt but that, in general, a man will be more strongly disposed to make false evidence to serve himself, than to serve another. But, under the impression of his remaining under the eventual obligation of being counter-interrogated on the ground of this extrajudicially written self-serving evidence, no less sharply than on the ground of oral evidence of the same tendency delivered on the spot, — counter-interrogated, and with time in abundance to frame the plan of interrogation; or (in the case here supposed) under the assurance that such counter-interrogation cannot be escaped from definitively but by death, nor for a time but by expatriation or exprovinciation, both of them facts operating in the character of circumstantial evidence, to the discredit of such his written testimony; the sort of fraud in question does not present itself as likely, either to succeed if attempted, or so much as likely to be attempted.

Where exclusion of evidence would be improper, precautionary regulations, to diminish the chance of deception from such evidence, are very often proper, and in a high degree.

Let the danger of misdecision, the result of deception produced by casually-written evidence, be, in comparison of the danger of misdecision from exclusion, ever so inconsiderable, whether in point of magnitude or probability: still, no expedient ought to be neglected, by

which, without its being productive of preponderant inconvenience in any other shape, the danger from admission promises to be diminished.

To an effect thus desirable, the following regulations present themselves as promising to be conducive:—

1. In every instance in which evidence of the description here in question, is, in any of its possible modifications (as herein above enumerated), produced; let it be an instruction from the legislator to the judge, to state, at the time of his giving judgment, the infirmity of so much of the evidence as comes under this description, and (in the case of his having given credence to it notwithstanding) the considerations by which such his credence has been determined: and this, if judging without a jury, for the satisfaction of the parties, the audience, and the public at large; if sitting with a jury, for the instruction of the jury.

2. Whensoever, in consequence of the non-forthcomingness and non-interrogability of him whose discourse the script appears to be, it is admitted notwithstanding, — the judge having thought fit rather to give admission to it at that time, than to put off the decision in expectation of the forthcomingness and interrogation of the supposed author of such testimonial discourse; let it be a rule of law, that, so soon (if ever) as the means shall exist of performing the interrogation, without preponderant inconvenience in the shape of vexation and expense, such interrogation shall, at the instance of any party in the cause, be performable.

3. If, upon admission and consideration

given to any such article of makeshift evidence, it shall seem good to the judge to determine in favour of the party at whose instance such evidence was received; power should be given to the judge, on the declared ground of the infirmity of this part of the mass of evidence, to require, at the hands of the party in whose favour such judgment is pronounced, such security for eventual restitution *ad integrum*, and to take such other measures of precaution, by sequestration or otherwise, as may in his judgment be necessary and sufficient to prevent the happening of irreparable damage: such damage as might afterwards be found to have taken place, if, in consequence of the facts brought to light by such subsequent interrogation or any other means, it shall have turned out that the provisional decision so pronounced (as above) was, in point of fact, ill-grounded.

In ancient French law, casually-written evidence appears not to have been considered in the light of makeshift evidence: it was considered, on many occasions at least, as more trustworthy than ordinary testimonial, viz. judicially-exhibited testimonial, evidence. It appears to have been designated by, or at least comprehended under, the term *commencement de preuve par écrit*, mentioned in one of the fundamental codes; the business of which is, in certain cases, to exclude testimonial evidence, as insufficient in itself: insufficient, unless fortified by the support of an article of this species of written evidence.

The impropriety of this preference was not quite so great, under that actually-established technical system, as it would be under a natural

and rational system. In testimonial evidence, under that system, an infirmity produced by the insufficiency of the mode of receipt and extraction there employed, has been already brought to view. It might be superior in trustworthiness to testimonial evidence so extracted, and yet deserve no better appellation than that of a species of makeshift evidence. The species of written evidence in question is what it is, is the same thing, under all systems: but, under the original Roman, the Romano-Gallic system, testimonial evidence was bereft of part of its natural trustworthiness.

Another circumstance that helps to give colour to the preference, and operates even in diminution of the impropriety of it, is, that, in a certain point of view (*i. e.* with reference to a matter of fact of a particular description), casually-written evidence is really better than testimonial evidence. What it does not prove so well is, the *truth* of any of the matters of fact, asserted in and by the assertion made by the script. What it does prove, however, and still better than any testimonial evidence, (prove, *viz.* upon the supposition of the authenticity of the script), is the fact that assertions to that effect were, by the person in question, actually *made*, *viz.* made in and by the script at that time. In itself (supposing always the authenticity of it) it has, as to this point, all the trustworthiness that belongs to the best sort of preappointed evidence: the difference lies only in the property of authenticity, the proof of which is, in the case of preappointed evidence, made the object of special care, instead of being left to chance, as in this other case.

In respect of the source, and therefore of the grounds of comparative untrustworthiness or trustworthiness derivable from that quarter, casually-written evidence is (it has been seen) susceptible of whatever modifications testimonial evidence is susceptible of. It may be extraneous; it may be self-regarding: self-regarding, it may be self-disserving, or self-serving: extraneous as well as self-regarding, it may be lowered by particular exposure to sinister interest, or by habitual improbity. To all these differences, important as they are, French practice, grounding itself on the *Ordonnance*, was in a manner insensible. A *commencement de preuve par écrit*, a something upon paper, there must be: but what that something should be, seems scarcely to have been considered as worth thinking about.

Even a lot of judicial testimonial evidence* appears to have been considered as constituting a *commencement de preuve par écrit*.

Judicial evidence, and casually-written evidence, were thus completely confounded. So loose, in French law, was men's conception of the different species of evidence !†

* A lot of self-regarding, self-serving and disserving evidence: the testimony of the party, extracted, at the instance of the adverse party, by *interrogation sur faits et articles*. — *Causes Célèbres*.

† *Plaidoyers de Linguet*, vii. 409. De Gouy's case. "Quelles preuves écrites invoque-t-elle pour les démentir? Un prétendu certificat arraché à un domestique timide, qui n'en a pas prévu les conséquences, et démenti par elle-même dans sa plainte." A curious certificate indeed! The witness, for any thing that appears, still alive; his testimony not allowed to be judicially extracted; but, in the form of this extrajudicial script, and under the notion of a *commencement*

SECT. II. — *Of ex parte preappointed written evidence.**

THE order adopted requires that something should now be said on the subject of *ex parte* preappointed written evidence. But it is only in respect of its not being with propriety comprizable under the same denomination as extrajudicially and casually written evidence, that it demands a separate head. For, in respect of trustworthiness (*i. e.* of probative force), it partakes of the same nature, and the same natural infirmities as have been operating in diminution of the probative force of casually-written evidence.

de preuve par écrit, exhibited and argued upon ! By the same rule that the testimony of this servant was thus extracted in the form of what is called a *certificate*, so on any occasion might that of any other witness ; and the security afforded by judicial examination discarded altogether.

Gouy's case, vii. 339. " La justice, instruite du danger de la preuve testimoniale, surtout dans ces sortes de matières," (disputes between husband and wife) " redoute de livrer à l'incertitude et au hasard l'état des conjoints."

Barthélemi's case, vii. 62. " Quand cet acte, muni de leurs signatures, a subsisté pendant huit ans entiers, sans la moindre apparence de suspicion, il est inutile, il est dangereux de prétendre invoquer des témoignages étrangers, et d'écarter une déposition muette mais irrecusable, pour en admettre de verbales, toujours plus que suspectes en matière civile."

Ib. 63. " De deux preuves qui se combattent, la plus forte subsiste sans contredit : or, sans contredit aussi, la preuve par écrit est plus forte que la preuve par témoin."

* This and the following section were left by the author in the state of mere fragments. Several *memoranda*, far too incoherent to be inserted, prove it to have been his intention to enter more fully both into the subject of *ex parte* preappointed evidence, and into that of adscititious evidence. It does not appear, however, that he carried this intention into effect.—*Editor.*

Preappointed it is ; preappointed it cannot therefore but be denominated : but, in respect of probative force (not to speak of other properties), it partakes not, in any degree, of the trustworthy character of the great mass of preappointed evidence ; viz. that which is the work, either of all parties concerned in interest, acting in conjunction, or of some single, but naturally impartial, and commonly highly stationed, hand.

In comparing *ex parte* preappointed with casually-written evidence, the reader cannot but observe, that unintentional incorrectness is more probable in the case of casually-written than of *ex parte* preappointed evidence, for exactly the same reason which renders such incorrectness still more probable in the case of common conversation than in either, viz. the greater probability of a deficiency of attention.

On the other hand, intentional incorrectness, for the purpose of the characteristic fraud, is, for this same reason, more probable in the case of *ex parte* preappointed, than it is in the case of casually-written evidence of the same import : because, if a man sets himself to forge evidence, the greater apparent trustworthiness of *ex parte* preappointed evidence, arising from the cause above brought to view, would naturally induce him to give that form, rather than the form of casually-written evidence, to the forged document.

The practical rule in regard to *ex parte* preappointed evidence is the same with that which has been already laid down as applicable to casually-written evidence.

Is the person by whom it was committed to writing in existence, and accessible for the purposes of justice? Let him be examined *viva voce* in open court, subject to counter-interrogation; and let not the written evidence be admitted, otherwise than in the character of notes, to assist the memory of the deponent. Is the writer deceased, or the subjecting him to interrogation physically or prudentially impracticable? Admit the document, making allowance for all the circumstances which can operate in diminution of its credibility; hear every body who can tell you any thing concerning the document that can afford you any help in judging of the degree of confidence which it deserves; and make the same provision as in the case of casually-written evidence, for the ultimate interrogation of the writer, should it at any future period become practicable.

The grounds of all these arrangements being precisely the same in the case of *ex parte* pre-appointed, as in that of casually-written, evidence, it would be superfluous to present them a second time to the reader.

SECT. III. — *Of adscititious evidence; i. e. evidence borrowed from another cause.*

WHAT is meant by adscititious evidence, as also in what its characteristic infirmity consists, has been seen in the preceding chapter. It remains to shew, what is the part which ought to be taken in relation to it, by the legislator and by the judge.

Adscititious evidence divides itself into two kinds; which are not indeed mutually exclusive of one another, but which, for reasons that will appear as we advance, require to be distinguished.

1. Evidence *inter alios*: evidence already exhibited *coram judice*, in the character of judicial evidence, but in a cause between other parties, *i. e.* in which the list of the parties on both sides was (either in the whole, or as to some one or more of the persons contained in it) different from the list of the cause in question, the posterior cause.

2. Evidence *alio in foro*: evidence already exhibited in the character of judicial evidence, but in a cause which (whether carried on by the same list of parties, or by a list in any respect different) was carried on before a different tribunal: understand, by a tribunal in which the rules of evidence are known or suspected to differ more or less from those observed in the tribunal in question.

But the other tribunal before which the evidence in question had thus on a preceding occasion been exhibited, may either have been a tribunal acting under the government of a foreign state, or a tribunal acting under the same government: and, in the latter case, a tribunal of a different province, or a tribunal of the same province: and, in either case, a tribunal governing itself by the same rules of evidence, or a tribunal governing itself by rules of evidence in any respect different.

Between these two last-mentioned modifications of makeshift evidence, viz. evidence *inter alios*, and evidence *alio in foro*, there exists a

very wide and material difference. Of evidence *inter alios*, the inferiority, as compared with the opposite case, that of evidence *inter eosdem*, is produced by an universally operating and irremovable cause ; viz. a deficiency, more or less considerable, in respect of that interest, on which the efficiency of the instituted securities for trustworthiness is apt to be in so considerable a degree dependent.

On the other hand, in the case of evidence *alio in foro*, the inferiority, real or supposed, depends altogether upon the accidental difference between the rules of evidence actually observed in one court, and those actually observed in another court. Its root lies in the diversities of practice that prevail as between court and court, in matters in which, if it were rational in all, the practice would, with very slight differences, be the same in all. It lies in the wretchedly imperfect state of this branch of procedure (not to speak of any other), in every nation hitherto existing upon earth.*

The course proper to be taken, in respect to adscititious evidence, will be found to vary, according as the document in question is a previous *decision*, or the whole or some part of the *minutes of the evidence* delivered in a previous cause.

In respect of the propriety of admission, both these species of adscititious evidence stand nearly on the same ground. Neither of them

* Here ends all that Mr. Bentham had written on the subject of adscititious evidence, with the exception of some loose memoranda. What follows was chiefly made up from these memoranda by the editor.

ought to be admitted, when better evidence from the same source is, without preponderant inconvenience, to be had; neither of them ought to be rejected, when it is not.

There is not, probably, that system of judicial procedure in existence, (how bad soever the mode of taking evidence that it employs), which does not afford a greater probability of right decision than of wrong; and in general the presumption of right decision is a very strong one. True it is that no decision of a court of justice, certifying the existence of a fact, affords ground for believing it, any farther than as such decision renders probable the existence, at the time when it was pronounced, of *evidence* sufficient to support it: and if the original evidence, on which the decision in the former cause was grounded, were forthcoming in the present, that evidence would be preferable, as a foundation for decision, to the mere opinion formerly pronounced on the ground of that same evidence by a judge. But it scarcely ever happens that evidence which has once been presented, admits of being again presented in as perfect a form as before. All that important species of evidence which is constituted by the deportment of the witness in the presence of the judge, is, in most cases, irrecoverably lost: such evidence as can be obtained now, might not be sufficient to warrant the former decision, and yet the decision, when pronounced, may have been perfectly borne out by the evidence on that occasion adduced. On the other hand, it is true that, in very many cases, by recurring to the original sources, sufficient evidence of the fact might even now be

obtained, not, however, without more or less of delay, vexation, and expense : for the avoidance of which, it is often proper that the previous decision, though an inferior kind of evidence, should be received as a substitute, in the place of a superior kind.

As to the minutes of the evidence delivered in the former cause ; it is sufficiently manifest that they ought not to be admitted, if recurrence to the original sources of evidence be practicable, without preponderant inconvenience ; if the witnesses in the former cause be capable of being examined, or such written or real evidence as it may have afforded be capable of being exhibited, in the present : unless when there may be a use in comparing two testimonies delivered by the same witness on two different occasions. But if (no matter from what cause) recurrence to the original sources be either physically or prudentially impracticable, the minutes of the former evidence should be admitted, and taken for what they are worth. If the evidence in question be oral testimony, being generally upon oath, subject to punishment in case of intentional falsehood, and to counter-interrogation, it is at any rate better than hearsay evidence, which, at its origin, had none of these securities : if it be real evidence, the official minutes of it are the very best kind of reported real evidence, of which hereafter.

A question of greater nicety is, whether in any, and, if in any, in what cases, adscititious evidence shall be taken for conclusive ?

In the case of minutes of evidence, the short answer is, never. The testimony of a witness, or of any number of witnesses, even if delivered

in the cause in hand, and under all the securities which can be taken in the cause in hand for its correctness and completeness, ought not to be, nor, under any existing system of law that I know of, would be, taken for conclusive: much less a mere note of the testimony which they delivered on a former occasion, subject perhaps, indeed, to the same set of securities, but perhaps to a set in any degree inferior to those which there may, in the cause in hand, be the means of subjecting them to.

The case of a *decision* is more complicated. For the purpose of a prior cause, a decision has been given which supposes proof made of a certain fact; and the question is, whether, on the ground of such decision, such fact shall be taken for true,—shall be considered as being sufficiently and conclusively proved,—for the purpose of the decision to be given in a posterior cause?

It must of course be assumed, that the prior decision *necessarily* supposes evidence of the fact in question to have been presented to the judge, sufficient to create in his mind a persuasion of its existence: for there would be manifest impropriety in making the decision conclusive evidence of any fact not absolutely necessary to its legality; with whatever degree of *probability* the existence of such fact might be inferred from it.

1. Let the parties be the same; and the tribunal either the same tribunal, or one in which the same or equally efficient securities are taken for rectitude of decision. In this case, unless where a new trial of the former cause would be proper, the decision in the former cause ought to be taken as conclusive evidence

(for the purpose of the posterior cause) of every fact, proof of which it *necessarily* implies. A lawyer would say, *Quia interest reipublicæ ut sit finis litium*. Not choosing to content myself with vague and oracular generalities, which are as susceptible of being employed in defence of bad arrangements of procedure as of good ones, I place the propriety of the rule upon the following more definite ground: that, as every person who would have an opportunity of applying the security of counter-interrogation in the second cause, has had such an opportunity in the first; and as the rules of evidence which were observed in the former trial, were, by supposition, as well calculated for the extraction of the truth, as those which would be to be acted upon in the present; the judge on the second occasion would have no advantage, in seeking after the truth, over the judge on the first, to counterbalance the disadvantage necessarily consequent upon lapse of time: and the decision of the first judge (though strictly speaking it be only evidence of evidence) is more likely to be correct, than that which the second judge might pronounce on the occasion of the posterior cause.

The case is different if fresh evidence happen to have been brought to light subsequently to the first trial, or if there be any reason for suspecting error or *mala fides* on the part of the first judge. But, in either of these cases, a new trial of the former cause would be proper. If the fact be sufficiently established for the purpose of the first cause, it is sufficiently established for the purpose of any subsequent cause between the same parties. It is only when

there appears reason to think that it was improperly considered as established in the first cause, that there can be any use in going through the trouble of establishing it again in the second.

The above remarks apply also to the case in which the parties to the second cause are not the actual parties to the first, but persons who claim in their right, their executors, for example, or heirs-at-law; or even persons claiming under the same deed, or, in any other way, upon the same title; all those, in short, who in English law language are quaintly called *privies* in blood, in estate, and in law: for though these have not had an opportunity of cross-examining the witnesses in the former cause, other persons representing the same interest have.

2. Suppose the parties different, that is, with different interests, and the same reasons do not apply. The deficiency in respect of securities for trustworthiness, which constitutes the inferiority of adscititious evidence, may now have place to an indefinite extent, and is always likely to have place to some extent. It will very often happen that there was some part of the facts, known to the witnesses in the former cause, which would have made in favour of one or other party to the present cause; but which did not come to light, because, there being no one among the parties to the former cause in whose favour it would have made, it found no one to draw it out by interrogation. The former decision, therefore, although conclusive against the parties to the former cause, and all who claim under them, ought not to be conclusive against a third party. If

it were, an opportunity would be given for a particular modification of the characteristic fraud: a feigned suit instituted by one conspirator against another, and judgment suffered by the latter to go against him, with the view of establishing a false fact, to be afterwards made use of in a suit against some other person.

The above observations constitute what foundation there is for the rule of English law, that *res inter alios acta* is not evidence: of which hereafter. Note, *en passant*, the character of jurisprudential logic: a decision *inter alios* is not *conclusive* evidence, therefore not *admissible*.

3. Lastly, suppose the tribunals different, and governed by different rules: and let the rules of the tribunal which tried the first cause be less calculated to insure rectitude of decision than those of the tribunal which tries the second. In this case, with or without the deficiency in point of security, arising from the difference of the parties, there is at any rate the deficiency which arises from the imperfection of the rules: the impropriety, therefore, of making the decision conclusive, is manifest. Its probative force will evidently vary, in proportion to the imperfection of the rules which govern the practice of the court by which it was pronounced; always considered with reference to the main end, rectitude of decision.

The probative force will be greater, *cæteris paribus*, when the court from which the evidence is borrowed is in the same, than when it is in a different, country; on account of the greater difficulty, in the latter case, of obtaining

proof of the existence of the characteristic fraud. But this presumption is much less strong than that which arises from a difference in the mode of extraction.

We shall see hereafter to how great an extent nearly all the above rules are violated in English law.

CHAPTER III.

OF UNORIGINAL EVIDENCE IN GENERAL.

THE quality of unoriginality seems applicable to an article of evidence in either of two cases : 1. where it is so with relation to persons, — to persons considered as sources of the evidence ; 2. when it is so in respect of *signs*.

It is so as to persons, wherever the perceptions stated by the person whose evidence is rendered present to the senses of the judge, are stated by him as being not his own perceptions or opinions, but perceptions or opinions communicated to him by some other person, as and for the perceptions of that other. Had the perceptions or opinions been stated by him as his own, they might have been termed original : not being stated by him as his own, they cannot with propriety be termed *original*, they are termed not original, but *unoriginal*. In himself, if he says truly, they did not originate ; but in the other person so spoken of.

The evidence is unoriginal in respect of *signs*, when the signs (*i. e.* the collection of visible and permanent signs, viz. written characters) presented to the senses of the judge, are not the same collection of signs by which the discourse

in question stood expressed, when consigned to writing for the first time : not these, but some others : which, — having been transcribed from those, in the design of rendering (so far as both go) the signification of the copy thus made exactly the same as that of the original, — may accordingly be termed *transcriptitious*.

The evidence orally delivered, and of the nature of what is called hearsay evidence ;—the evidence delivered in writing, and of the nature of a transcript : — in both these cases, it may alike be termed unoriginal.

In both instances it is understood at once, that, in point of probative force, the unoriginal evidence will be in a greater or less degree inferior to the original. But, in the two cases, the defalcation made by the circumstance of non-originality from the probative force of the evidence, will immediately be seen to be, generally speaking, widely different.

Such as our conceptions are, such ever must language be. In vain, on any subject, will that man seek to add any thing material either to the correctness or to the amplitude of the current stock of conceptions, who fears the reproach of the endeavour to make additions to the language. A subject must have a name, before any thing can be predicated of it : and of the subject, be it what it may, till something is predicated, nothing will be understood.

Among non-lawyers, as well as among lawyers, the word *hearsay* is already in use. Among lawyers, the word *original*, and the word *copy*, are in use. With so slender a stock of the instruments of discourse, has the business of

argumentation, and thence the business of judicial decision, been hitherto carried on in this part of the field of law.

Even of so slender a stock, a stock comprised of three words, and no more, there exists one which is not fit for use. By reason of its ambiguity, the word *copy* is not fit for use. Does it mean *transcript*, in contradistinction to the original script? or does it mean *exemplar*? as in the case when, in a mass of letter-press, all may be equally originals, or all equally transcripts.

Such as yet is the supply: here follows a part at least of the demand.

In the case of want of originality, (it has already been observed) the seat of the defect may be in the person by whom the evidence is delivered, or (in the case when at the time of delivery it wears the form of writing) in the collection of signs of which the writing is composed.

When the seat of the defect is in the person; when, upon his own shewing, the deposing witness is a different person from him by whom the matters of fact in question were observed; in this case there are, at least, two persons, upon whose trustworthiness the probative force of the testimony depends: two persons so connected, that, by the reduplication, the probative force, far from being increased, is lessened.

Of the deposing witness the existence is, by the supposition, certain: of the existence of the alleged percipient witness, of the existence of any percipient witness, the existence is necessarily and constantly a matter of doubt. On this account it is, that, without some such

prefix as the word *supposed*, he ought never to be mentioned.

Instead of supposed *percipient* witness, the occasion may sometimes require us to say the supposed *extrajudicially stating* or *narrating* witness: for neither are the terms synonymous, nor the persons in every case the same.

In the character of a *percipient* witness, a man will not, generally speaking, have made himself known to the deposing witness, unless by having made himself an *extrajudicially narrating*, *reporting*, or *stating* witness. But, in the character of an *extrajudicially narrating*, *reporting*, or *stating* witness, a man may easily have certified himself to the deposing witness, without having been a *percipient* or *observant* witness.

Notions other than such as can, strictly speaking, be termed perceptions, may moreover be not altogether without their use in evidence: and, useful or useless, they may serve to constitute the matter of which evidence is composed.

Of the persons through whose mouths the supposed statement of the supposed *percipient* or originally *extrajudicially narrating* witness may, from one to the other, have passed, or be supposed to have passed, the number may, to any amount, be great. Under French judicature, in the famous case of Calas, between the supposed *percipient* and the deposing witness there were no fewer than five.

So many of these supposed successive narrators (including the deposing witness), so many *media* through which the supposed perception has been transmitted, in its way to the ear or the eye of the judge: so many *media*; of which one alone is judicial, the others *extrajudicial*.

By every extrajudicial medium, the evidence is removed, removed by one *remove*, from that degree of proximity which it were desirable it should possess, and which in the case of ordinary evidence it does possess, with reference to the eye or the ear of the judge.

Equal to the number of media, as above, may be said to be the number of *degrees*: equal to the number of media and degrees *minus* one, may be said to be the number of *removes*.

Media, degrees, removes: with equal propriety, and in the same sense, though with very different effect, and with much less force, does this nomenclature apply to the case of *transcriptitious* evidence.

And thus it is, that, in either case, constitutive of so many modifications or species of unoriginal evidence, we have unimedial, bimedial, trimedial, and so forth: in a word, *multimedial* evidence.

The two sources or causes of inferiority, the two modes of unoriginality, may be combined in the same lot or article of evidence.

Thus, for species or modifications of multimedial evidence, we have *simple*, (composed either of multi-personal alone, consisting of person supposed to have spoken after person, or of transcriptural alone), and *complex*, composed of both those modes of unoriginality put together.

Not of personal evidence alone, but of *real* also, may originality and unoriginality be both predicated.

Real evidence is original, is originally delivered, when the thing which is the source of it is itself presented to the senses of the judge:

unoriginal, when all the conception he can entertain concerning it is that which is conveyed to his mind through the medium of the testimony of a witness, commonly a deposing witness.

The shape in which the testimony of the deposing witness is conveyed to the senses of the judge, may be either the oral or the written shape. Hence it is that, when there has been no transcription, scriptitious may stand exactly upon a footing with hearsay, as well as with original evidence.

When the testimony, being unoriginal, is composed of that of two persons, one as it were behind the other,—the *form* in which the respective testimonies have been delivered, viz. oral or scriptitious, is a circumstance by which differences, which require to be noted, may be produced in the probative force of the compound testimony.

In the case where the supposed original evidence is of the *real* kind; in that case, the species of inferiority which, in the case of personal evidence, requires two persons, two witnesses, to the production of it, is produced by the testimony of a single witness, interposed between the thing which is the source of the evidence and the senses of the judge.

After these explanations, the following modifications of unoriginal evidence may, it is supposed, be rendered sufficiently intelligible by the denominations here employed for giving expression to them.

1. Supposed oral through oral : supposed orally delivered evidence of a supposed extra-

judicially narrating witness, judicially delivered *vivâ voce* by the judicially deposing witness.

This is the only species of unoriginal evidence which the term *hearsay* evidence is, strictly speaking, competent to the expression of.

2. Supposed oral through scriptitious.

3. Supposed scriptitious through oral.

4. Supposed scriptitious through scriptitious: in other words, *transcriptitious* evidence.

In all four cases, the supposed original testimony must, in whichever shape delivered, be supposed to have been extrajudicially delivered.

In all these four cases, an interval of considerable length must, moreover, be supposed to have intervened between the supposed extrajudicial statement and the judicial one. Suppose no such interval, and the evidence stands, to every practical effect, undistinguishable from original evidence.

1. Thus, in the case of supposed oral through oral. A percipient witness, being in or near the judicatory, delivers his testimony in a low tone: and this evidence, not being sufficiently audible, is, by some other person (suppose an officer of the court), repeated in a more audible tone, for the convenience of the judge.

2. So again in the case of supposed oral through scriptitious. This would be the common case of note-taking. Deposition of a percipient witness, extracted *vivâ voce* before a judicatory; notes or minutes thereof taken by a clerk, and the minutes delivered in to another. In this case, the word *supposed* would (it is evi-

dent) be regarded as superfluous or ill-placed. The note-taker, unless specially interrogated, would not be considered in the character of a distinct deposing witness.

3. So again in the case of supposed scriptitious through oral. This would be no more than the common case of written evidence read in court: for example, an affidavit. Here, too, the use for the adjunct *supposed* vanishes.

4. Lastly, in the case of supposed scriptitious through scriptitious. The witness having read to himself on one day a document capable of being adduced in evidence, parts with it immediately out of his hands. On the next day, from memory, he, in a judicial form, interrogated or not, writes an account of what, according to him, are the contents. This is supposed scriptitious through scriptitious; and he, the writer, is a witness. But while he is thus writing his account of the contents, suppose the paper to be lying before him. This is no longer the case of a reporting witness, simply reporting (if extrajudicially), or deposing (if judicially), to the contents of a statement made by another person, who is considered in the character of a percipient and extrajudicially narrating witness: it is the case of a scribe; and according as in his script words the same as those employed in the original, or words more or less different, are employed, his script is a transcript, an extract, or an abridgment.

Thus various and thus faint are the shades of difference by which one modification of unoriginal evidence is distinguished from another.

All modifications of unoriginal evidence that

are of the nature of, or bear similitude to, hearsay evidence, as above, have this in common, — that for every remove (mendacity and fraud out of the question) they afford an additional chance of incorrectness and incompleteness.

But besides this,—supposing admission to be secured to them, and known to be so,—they afford, all of them, invitation to one and the same plan of fraud; which fraud is, moreover, equally applicable to casually-written and *ex parte* preappointed evidence. Secure, not only against punishment, but against adverse interrogation, the extrajudicial narrator and supposed percipient witness delivers his statement *viva voce*, or in writing, as the case may be; that statement being tinctured with mendacity, in the shape that seems best adapted to the sinister purpose, whatever that may be. The extrajudicially narrating witness has contrived, for the purpose, to place himself (if he be not so already) out of the reach of punishment. The judicially deposing witness, so long as he reports nothing but what has, to his knowledge, been expressed by the extrajudicially narrating witness, is not punishable; since, by the supposition, he says nothing that is not true.

CHAPTER IV

OF SUPPOSED ORAL EVIDENCE TRANSMITTED
THROUGH ORAL, OR HEARSAY EVIDENCE.

So many features belong in common to extrajudicially written and to hearsay evidence, that what would have been necessary to have been said on the subject of this last-mentioned species of evidence, had it been considered before the other, is, by what has been already said on the subject of the other, rendered unnecessary to be said here.

It is of the essence of hearsay evidence to present to the notice of the judge two distinct persons in the character of witnesses: a supposed percipient and extrajudicially narrating witness, stating, at some antecedent point of time, in the hearing of any person not on that occasion invested with the authority of a judge, some matter of fact as having had place; and a deposing, or say judicially narrating witness, who bears testimony, not to the truth of that matter of fact, but to its having actually been asserted, on the extrajudicial occasion in question, by the extrajudicially stating or narrating witness.

So distinct are the two characters, and, to

the purposes of truth and justice, so material to be distinguished, that, while the one (viz. that of the deposing witness) is in every individual instance filled by a really existent person,—the other (viz. that of the percipient or extrajudicially stating or narrating witness) may happen to be a character altogether fictitious. The person, it may happen, is fictitious; or, though the person be at the time in question a person really existing, the statement or narration, and alleged perceptions, attributed to that really existing person, may on the whole, or as to any part, be fictitious.*

* The testimony given by the deposing witness may, if false, be false *in toto*, or false *pro parte*.

It is false *in toto*, if so it were that, to any such effect as that deposed to, no such extrajudicial statement was made by any person: the whole being purely the invention of such deposing witness.

If, as to any part, a statement to any such effect as that deposed to, was, at the time and place deposed to, made by any person in the character of a percipient witness, though not the very person deposed to in that character; even in this case it may be too much to consider the testimony as false *in toto*. In point of effect, the difference between one person and another, in the character of an extrajudicially narrating witness, may be altogether immaterial, or, according to the character and situation of the two persons, may be material to any the highest degree.

Person of the supposed percipient or other supposed extrajudicially narrating witness,—time of the supposed extrajudicial narration or statement,—place in which it was made; in respect of any or all these several circumstances, the deposition may be determinate, or in any degree indeterminate; more or less indeterminate, not only in respect of time and place, but even as between person and person: *ex.gr.* whether it was one out of two determinate persons, some one out of three or more; and so on in regard to degrees of persuasion as to the question which of them it was; or the person may have been altogether unknown and indeterminate.

To the statement or narration judicially delivered by the deposing witness, and to that alone, belongs therefore, in propriety of speech, the denomination of *hearsay* evidence.

Supposed extrajudicially stating or narrating witnesses may have stood in a series of any length, one behind another. The causes of untrustworthiness applying to every human being, and, to every being of which nothing more is known than that he or she is human, with equal force; it is evident, that, the longer the line of these supposed witnesses, the less is the probative force of their supposed testimony.

Of the case which exhibits more such supposed extrajudicial witnesses than one, what little requires to be said, will be said in another place:* throughout the course of the present chapter, no more than one will be supposed. Of whatever is said under this head, it will be easy to make application to the whole possible series of those other cases.

Supposing (as above) one, and no more than one, supposed extrajudicially stating or narrating witness; the character of the testimony will be found to admit of nine variations: the supposed testimony of the supposed extrajudicial witness, under each of three characters, being capable of being deposed to by the deposing witness under each of the same three characters. Thus,

I. By an extraneous deposing witness may be related the supposed extrajudicially deli-

* Ch. X. of this book.

vered testimony of the three sorts of extrajudicial witnesses, viz.

1. Another extraneous witness.
2. A party on that side of the cause on which the hearsay evidence is not called for.
3. A party on that side of the cause on which the hearsay evidence is called for.

II. By a party on that side on which the hearsay evidence is not called for, may, in like manner, be related the supposed extrajudicially delivered testimony of the same three descriptions of persons, viz.

1. An extraneous witness.
2. Another party on that side of the cause on which the testimony of the hearsay witness is not called for.
3. A party on that side of the cause on which the hearsay evidence is called for.

III. Lastly, by a party on the side of the cause on which the hearsay evidence is called for, may, in like manner, be related the supposed extrajudicially delivered testimony of the same three descriptions of persons, viz.

1. An extraneous witness.
2. A party on that side of the cause on which the hearsay evidence is not called for.
3. Another party on that side of the cause on which the hearsay evidence is called for.

In the case of hearsay evidence, the particular description of the characteristic fraud above mentioned (the fraud applying in common to every species of makeshift evidence) is as follows. Under the assurance of his not being subjectable to eventual punishment or to counter-interrogation, a man utters *viva voce*, on some extrajudicial occasion and place, a state-

ment or narration, of the incorrectness or partial incompleteness of which he himself is conscious.*

In regard to admission, and the terms on which it shall take place, the rules which have been seen applying to extrajudicially written

* A supposable case of mendacity, and even of fraud, is this. Mendax, in support of a claim of his own, comes forward in the character of a deposing witness, supporting it by hearsay evidence: which hearsay evidence consists in deposing that in his hearing (on an extrajudicial occasion) Umbra spoke of herself as having, at a time mentioned by her, seen, in the character of a percipient witness, a certain fact which, had it really happened, it would have fallen in her way and in her way alone to have so witnessed: assisted, for instance, in the character of a midwife, at the birth of Titius. Here we have an article of hearsay evidence, which, though by the supposition false, is of essential use to its fabricator; rendering to the plan of falsehood a service which perhaps could not have been rendered by any evidence of the nature of ordinary original untransmitted evidence. But this is not among the cases that come within the description of the characteristic fraud as above described. Wherever the characteristic fraud, employed in the shape of hearsay evidence, has place, the extrajudicial statement (though false) is really uttered and delivered. The case here supposed is a case not of hearsay evidence, operating by means of the fraud in question, there not having been in fact any extrajudicial statement or narration, any extrajudicial witness. It is a case of false original untransmitted evidence, pretending to be, but not really being, hearsay evidence.

An article of self-serving evidence to any such effect as the above, is, obviously, of itself a suspicious and weak article of evidence. But there is nothing to hinder it from being true, and, at the same time, supported by a body of truly reported circumstantial evidence.

It would be possible to exclude evidence thus constituted, and at the same time without comprehending in the exclusion either self-serving evidence as such, or hearsay evidence as such. It would be possible: but there seems not to be any adequate reason for the doing it.

evidence will be found to apply to hearsay evidence, without any difference considerable enough to render it worth while to exhibit those rules in the case of hearsay evidence, at the same length as those regarding extrajudicially written evidence.

The considerations from which, in the character of reasons, these rules were deduced, being the same, so of course will be the rules.

The only difference which there is, turns, so far as concerns admission, upon the magnitude of the danger (the danger from admission) under the two species of makeshift evidence: of which difference the delineation will constitute the matter of a following chapter.

In rule the sixth and last may be seen that which presents itself as the only instance in which the reasons in favour of the admission recommended by it seem to require, in the case of hearsay evidence, ulterior delineation, over and above such as correspond with those that have been already brought to view under the head of extrajudicially and casually written evidence.

Insulated, the alleged extrajudicial statement or narration of an alleged percipient witness will be little in danger of obtaining credence to such a degree as, if false, to be productive of deception. In connexion with other evidence, it may be necessary for the explanation and completion of an aggregate body of connected evidence: as in the case of a chain of facts following each other in a series, and composing together a body of circumstantial evidence.

Such may, in some degree, be the use of the

makeshift document, even in the case of extrajudicially and casually written evidence. But more particularly it may be observed, in favour of the proposed admission of hearsay evidence, that if, on the occasion of what passed in a conversation between two interlocutors, the discourse of one be excluded, that of the other will frequently be unintelligible: an incident, the probable frequency of which is the same, whether (relation had to that one of the interlocutors whose discourse it might be proposed to exclude) the tendency of the discourse were self-disserving, or self-serving.

CHAPTER V.

INSTRUCTIONS CONCERNING THE PROBATIVE
FORCE OF EXTRAJUDICIALLY WRITTEN
AND HEARSAY EVIDENCE.

THAT which ought in scarce any case to be done, and is most abundantly done (it has already been observed), is, to put an exclusion upon evidence, on the ground of danger of deception. That which ought throughout to be done, and nowhere has been done, is,—if legislation be the work of reflection, and reflection pointed to right ends,—to give the benefit of it, in the form of instructions, to the judge.

To bring to view such considerations as, on the occasion in question, present themselves as capable of being, in that character, assistant to the judge, if not in the way of information, in the way of reminiscence,—is the object of the present section.

I. Supposing admission given to both, and on the same conditions ; hearsay evidence is less likely than extrajudicially written evidence to have originated in the characteristic fraud : and (in so far as its incorrectness or incompleteness is regarded as not to be apprehended otherwise than as the result of such plan of

fraud) is less untrustworthy — may with propriety be considered as acting with a greater degree of probative force.

The only case in which, from either species of makeshift and thence uninterrogable evidence, any advantage would be to be hoped for, is that of a posthumous advantage; an advantage not looked to as capable of accruing during the lifetime of the contriver, to be reaped by the contriver himself; but, after his death, to his family, or some other person whose interests are dear to him. For as to the man himself, if he be *in esse*, a reasonable condition to require of him (wheresoever he be, at home or abroad) is, that he submit to counter-interrogation; which if he do, his doing so makes, in both cases, an end of the makeshift evidence.

In this case, to make a species of evidence which shall be exempt from counter-interrogation as well as eventual punishment, he has his choice between casually written evidence and hearsay evidence.

Suppose him to choose casually written evidence. This (it being by the supposition admissible) is that one of the two that will afford him the best chance.

If he writes it himself, in the name of another person not privy, this will be an act of forgery; a punishable offence, committed, in the first instance, in prospect of a benefit expected to accrue to others, and at a time when he will not be able to enjoy it.

If for the writing it he engages an assistant, who is privy to the fraud, and who writes it in his own character, here, indeed, is no

forgery, but here is a fraud with an accomplice, in whose power the contriver puts himself.

If he writes it himself in his own person, here is no forgery, nor is there any person in whose power he puts himself. This, supposing both species of makeshift evidence receivable (*viz.* casually written and hearsay), is, in both points of view (probability of success, and security against punishment), the most eligible.

Thus stands the plan of fabrication by means of makeshift evidence, on the supposition that casually written evidence is to be the instrument employed in it.

In this way, a man may use his endeavours to render an undue service to persons dear to him, even without subjecting the evidence to the discreditive observation of its being self-serving evidence. If it be a case in which their title cannot be derived but through himself, they taking in quality of his representatives, not but the right which he thus fraudulently conveys may be drawn by him from another source. A father, for example, may, by a fraud thus shaped, convey to his son an estate derived, not from the father's side, but from the mother's.

Suppose revenge, or gratification of causeless enmity, the posthumous benefit—the sole benefit—in view. Here the testimony stands not exposed to any such discreditive observation as the above.

In this may be seen by far the most promising, in other words the most deceptitious, shape, which the characteristic fraud can assume. If in this it be not too deceptitious to be admitted, in no other can it be.

Hearsay evidence renders an assistant necessary. The contriver of the fraud utters the statement or narration in the hearing of the assistant: so long as the contriver lives, the assistant is silent; for such silence is what (as above) the nature of the fraud requires: the contriver dead, then, for the purpose of giving effect to the benefit which (though to him a posthumous one) the contriver had in view, comes the assistant forward with his hearsay evidence.

The inferiority of this species of makeshift evidence, in comparison of the other, may be seen in more points of view than one. If he dies before the contriver, or (though not till afterwards) before his hearsay evidence has been judicially derived, — the plan is defeated: so if he expatriates, or forgets his lesson, or quarrels with the contriver. So much as to comparative probability of success. Meantime he exposes himself to loss of character, and (if the law has done its duty) to punishment, through the infidelity of his assistant.

The assistant, it is true, (so it may easily be managed), need not be privy to the fraud: to the intended assistant the false story is narrated as if it were true. In this way, danger of punishment through infidelity is avoided; but danger of ill success, by reason of death and expatriation, remain the same; danger of ill success through quarrel, not much less. But the danger from forgetfulness is much greater, the cause of remembrance being wanting. Taking a memorandum might, it is true, be recommended by the contriver to the intended innocent assistant, or a memorandum put into

his hand. But this circumstance would be still more likely to be remembered than any other ; and in the mind of the judge, if not in that of the innocent assistant, in his character of deposing witness, it would cast a shade of suspicion upon the scheme.

The number of innocent persons thus taken for intended assistants, might be multiplied to any amount ; but by no such multiplication could hearsay evidence, in the character of an instrument of this fraud, be raised to an equality with a letter or memorandum in writing, framed with a view to its officiating in the character of an article of extrajudicially written evidence.

Of the authenticity of a script, framed for any such express purpose, proof cannot, in the nature of the case, be wanting. Where adequate cause of remembrance is wanting, a story told is liable to be lost, whatsoever be the number of the hearers. In point of probability of remembrance, the difference between the seeing of a fact, and hearing a relation of it, is plainly infinite.

II. Setting aside, in both instances, the characteristic fraud, and purposed mendacity, to whatever purpose directed ; hearsay evidence seems in general more likely to be tainted, and moreover in a higher degree, with material incorrectness and incompleteness, than extrajudicially written evidence is.

Extrajudicially written evidence presents but one witness in whose person the causes of untrustworthiness, intellectual and moral (sinister action of interest included), are liable to have place. It requires, indeed, to be authen-

ticated ; a distinct purpose, for which evidence is necessary : but, in general, authentication is a matter little exposed to doubt ; and, moreover, proveable by witnesses in abundance, none of whom are exposed to the action of any of the causes of untrustworthiness.

Hearsay evidence presents always two witnesses, viz. the deposing witness, and (unless when the deposition is a mere fiction) the supposed extrajudicially stating or narrating witness : two witnesses, and the causes of untrustworthiness repeatable upon each.

In case of mendacity on the part of the deposing witness, the evidence is exposed to a cause of falsehood, against which the extrajudicially written evidence is comparatively secure. The fact, that, by such or such a person, such or such words, or words to such or such an effect, were spoken, is a fact of the evanescent kind,—not of a nature to leave behind it, in any case, any physical traces, capable of operating (if it be true) in confirmation of it, in the character of circumstantial evidence.

Even in case of veracity on the part of the deposing witness, the evidence is exposed to a cause of error to which extrajudicially written evidence is not exposed. In the case of extrajudicially written evidence, the discourse being in written or other permanent characters, the tenor of it is fixed ; whereas, in the case of hearsay evidence (especially if the discourse run into length), it is frequently impossible for the deposing witness to speak to the very words ; and then comes the uncertainty whether, of the words really spoken, the purport attributed to them by the deposing witness be

a faithful representation ; whether, and how far, the interpretation put upon them by the deposing witness is correct.*

To multiply in this way the number of hearers, not under any engagement of secrecy, will be to multiply the number of persons by whose conversation the story may be conveyed to some who will know it to be a lie, viewing at the same time in the person of the contriver the author of that lie. Thus, of a story which can be of no use to his purpose till after his death, the credit will have been destroyed in his lifetime.

Upon the whole, it appears that, so long as the supposed extrajudicial witness is not exempted from cross-examination, mischief in the way of misdecision would often ensue from the exclusion either of casually written or of hearsay evidence, and no adequate danger is to be apprehended from the admission of it.

If, indeed, the extrajudicial witness were exempted from cross-examination, and his unsanctioned and unscrutinised statement (or, in the case of hearsay evidence, his supposed statement) were received during his lifetime

* In this particular, however, what ought not to escape observation, is, that the meaning of words spoken on an extrajudicial occasion, in the way of statement or narration, concerning a fact to which it may happen to form the subject of an article of evidence, is not more liable to be misconceived, than the meaning of any set of words to which it happens to be considered as constituting the matter of an offence : words, for instance, in respect of which the utterer is charged with defamation ; or words by means of which the utterer is considered as having instigated to, or, by instruction, assisted any other person in, the commission of that or any other offence whatever.

in the place of his judicial testimony, much danger of misdecision would be the result. For, in this case, as any sort of man, the most untrustworthy, might, for the purpose of any suit whatsoever, without any the smallest danger to himself, make evidence, either for his own purpose, or for the purpose of any one who suborned him; such evidence, being on every occasion at the command of any person, would, in point of trustworthiness, in the eye of reason, be worth nothing. If then, on this consideration, it were never to receive credence in any case, justice would be deprived of the benefit of it in all such cases in which, had it been adduced, it would have been true, and (as such) conducive to the ends of justice. If, on the other hand, it were in general to be admitted and receive credence, it would be but too apt to be received in cases in which it would be false and deceptitious; the known security with which it might be manufactured and exhibited, would occasion its being manufactured in a multitude of instances without stint. False claims, in a number altogether unlimited, would be set up on the mere ground of the support to be given to them by this evidence: and, since the nature of the evidence admits scarce any means or chance of distinguishing false from true, the number might be so great, that, in every instance in which credence were given to this sort of evidence, deception and consequent misdecision on the part of the judge would be a result more probable than the contrary.

Here then would be a double mischief: the two opposite mischiefs of undue credence and undue discredence, running on at the same

time. Out of twenty false claims, set up on the ground of this evidence, suppose it to obtain credence in one only, and to be discredited in the nineteen others. The amount of the injustice thus done in the one case out of twenty, would itself be an enormous evil : this evil would be the result of undue credence. But the nineteen instances in which it were discredited, would be sufficient to throw a general, and to a considerable degree indiscriminating, discredit upon this species of evidence : the consequence would be, its being discredited in a number of instances in which, it being true, the discredit thus cast upon it would be productive of misdecision and injustice.

True it is, that, — on the supposition that it were generally known to be admissible, when, from death or other causes, the extrajudicial witnesses were no longer exposed to cross-examination, — motives for the fabrication of it, in the hopes of its serving a man's purpose after his death, would not be altogether wanting. But as, in such case, the inducement for the fabrication of it would, in comparison, be extremely feeble ; the quantity of it fabricated, if any, would be proportionably inconsiderable. The instances, if any, in which it were thus fabricated, and false, would scarcely be equal in number to the instances in which it would be true, and conducive, or even necessary, to the fulfilment of the ends of justice. But in the instances in which it were false, it would not follow by any means that because admitted it must obtain credence, and be regarded as conclusive. The possibility of its having originated in the characteristic fraud, would be an obvious objection,

a species of psychological circumstantial evidence, that could never fail to be opposed to it: and, being by the supposition false, it would find itself counter-evidenced and opposed at the same time by as many true facts as happened to be brought forward by whatever true evidence the cause happened to afford. Under these circumstances, there seems little danger of its being taken for more in each given case, than in that same case it were really worth: no more in the case of this *transmitted* evidence, than in the case of immediate evidence.

CHAPTER VI.

OF SUPPOSED WRITTEN EVIDENCE, TRANSMITTED THROUGH ORAL; OR MEMORITER EVIDENCE.*

THE supposed written evidence may either be of the nature of casually written evidence, or of written preappointed evidence (private or public, contractual or official).

Its trustworthiness will accordingly be varied according to the nature of its supposed source: the medium through which it is transmitted, being supposed the same in both cases.

When the alleged writing (supposing it oral) is of the nature of casually written evidence, the report thus made of it from memory, it is evident, (be the reporter who he may, be he

* In its original import, the term *memoriter* is not more properly applicable to this modification of transmitted evidence, than to hearsay evidence: since the subject of recollection, or pretended recollection, may as well be a supposed oral, as a supposed written, discourse.

But, in the language of classical education, the term *memoriter* is already in use, to designate the sort of exercise which consists in getting by heart, committing to memory, a portion of a book: a portion of a poem, for example.

Even in the age of original Latinity, *memoriter habita oratio*, says Cicero, (*Academ. Quest. iv. 9.*), to express a speech composed and got by heart.

in all respects ever so trustworthy), must in trustworthiness be inferior to what the article of casually written evidence would have been, had it itself, and without passing through any such medium, been presented to the senses of the judge.

In the case of memoriter evidence of this description, the characteristic fraud is this. For his own advantage, or for the advantage of a person dear (privy or not privy), Stellio, having fabricated or altered a script, puts it in the way of Memor, and then withdraws it again; to the end that Memor, having informed himself of the contents, may, on being judicially examined, report them in the character of a memoriter witness.

In respect of trustworthiness (the characteristic fraud out of the question), in a general point of view, this species of transmitted evidence may be apt to appear scarce distinguishable from the more ordinary modification, supposed oral through oral, *i. e.* hearsay evidence. In the supposed source of information consists the only difference: the *medium*, the chief source of deception, is the same.

On a closer examination, it will present some not altogether inconsiderable differences, resulting principally from the nature of the script, as above diversified.

To understand the relation, and measure the difference, a distinction must be made between the danger of mendacity, and the danger of incorrectness.

In the case of a supposed script amounting (if genuine) to no more than an article of casually written evidence, much of course will

depend upon the particular nature of the script. If it be altogether anomalous, such as a letter, or a loose memorandum made not in the way of any regular business; the difference in this respect between feigned memoriter evidence, and feigned hearsay evidence, will be scarce discernible. If it belong to any regular class of scripts, such as the shop-book of a shop-keeper, or any book of accounts kept in regular form, though by a person not embarked in any profit-seeking occupation; the sphere of mendacious invention will be proportionably confined. To obtain credit, the supposed script, according to the mendacious account given of it, must wear a certain degree of conformity to scripts of the like sort: it must be so far consistent with those true facts which the nature of the case cannot but afford, as not to be exposed to receive contradiction, on the ground of improbability, from circumstantial evidence.

In the case where the script was, or (if it had been really existing) would have been, an article of preappointed evidence — say an article of contractual evidence, (a deed of conveyance), — the field of mendacious invention is in general still more narrowly limited: though, in this respect, much of course will depend upon the nature of the deed: and so in the case of official evidence.

In the case of an article of contractual evidence, a man's chance for succeeding in his plan of imposition will depend not only on his acquaintance with the circumstances of the parties or supposed parties, but on his acquaintance with the dispositions made on that subject by the law.

In like manner, in the case of an article of official evidence, his success will naturally be more or less dependent on his acquaintance with the course of business as carried on in that office.

By this necessity of appropriate information, as a condition *sine quâ non* to the planning and carrying on an imposition of this kind with any promising prospect of success,—not only is the source of danger reduced to the testimony of a comparatively narrow description of persons, but to that sort of description of persons who, by reason of mental culture and situation in life, may naturally be expected to be above the ordinary level in point of trustworthiness.

In respect of the danger of incorrectness (mendacity out of the question), where, as here, the source of the evidence is a discourse fixed by the permanent signs of written discourse, it seems to possess a probative force considerably stronger than ordinary hearsay evidence never consigned to writing.

In the case of a purely oral discourse, the original received its birth and death at the same instant: the impression left by it on the conception, however faint, cannot at any subsequent time be strengthened: however incorrect, it can never afterwards be corrected. In the case of a discourse committed to writing, what is possible, indeed, is, that the glimpses caught by the eye may have been as faint or as incorrect as the glimpses caught by the ear, in the other. On the other hand, nothing hinders but that the view taken of it may have been as attentive, as correct, and as often repeated, as could be desired.

For the reason given above, the chances in favour of correctness may naturally be expected to be in general somewhat greater in the case of the preappointed, the contractual or official script, than in the case of the purely casual article of written evidence. In the case of the contractual species of script (the deed of conveyance more especially), the memory of the idiosyncratic particulars will naturally (to a professional, or in other words practised, mind) be assisted, and the field of recollection narrowed, by the general form of the species of deed; by those parts of the context which belong in common to deeds of that sort.

CHAPTER VII.

OF SUPPOSED ORAL EVIDENCE, TRANSMITTED
THROUGH WRITTEN ; OR MINUTED EVIDENCE.

IF the person by whom the minute is supposed to have been taken, be an official person, acting in virtue of his office ; and the discourse which he is committing to writing be the discourse of a person by whom, on the delivery of it, he is addressed in his official character ; such evidence is a species of preappointed evidence, official evidence : and, in a word, if the purpose for which, or occasion on which, the minute is thus made, be a judicial purpose or a judicial occasion, the discourse thus orally exhibited and minuted is neither more nor less than a mass of judicial testimony. The minutes taken of the deposition of a judicial witness, whether spontaneously exhibited, or extracted by interrogatories,—taken whether by the judge himself, or by a scribe of his in his presence,—belong to this head of evidence.

If the person by whom the minute is supposed to have been taken be not an official person, this species of evidence is of a nature

that presents itself as having been already included (or at least as capable of being included) under the denomination of casually-written evidence.

If, in a memorandum or letter, mention be made of a supposed fact, that fact may as well consist of a discourse supposed to have been holden by another person, as of any thing else. If mentioned as being holden by another person, it may be mentioned as being holden by him either at the very time of its being thus committed to writing (as in the case of a judicial deposition or examination, as above mentioned), or at any preceding point of time, separated from *that* point of time by any distance.

In general, the judicially-scrutinized testimony of any given person will, in all points taken together, be more trustworthy than the casually-written evidence of the same person; a memorandum or letter written by him. Yet instances are not wanting in which casually-written evidence will present a preponderant probability of standing the closest to the truth.

In the presence of Oculatus, a transaction takes place, of which, on that same day, he gives an account in a letter to a friend. Suppose Oculatus a man of probity, and either not exposed to the influence of any sinister interest, or too firm to be drawn aside by it; and suppose, at the same time, that either discernment or accident has rendered his account of it, not only correct as far as it goes, but complete; nothing can be more evident, than that such a letter will present a much more satisfactory account of the matter than could reasonably be

expected from the judicial testimony of the same person, examined, though in the best mode, at a distance say of twenty or thirty years after the event.

Cæteris paribus, the chance which an article of casually-written evidence has of being superior in trustworthiness to the judicial testimony of the same person, will be in the direct ratio of the interval of time elapsed between the day of the event and the day of the examination.*

The length of time, as above, being given; the advantage of the casually-written evidence, in comparison with the judicial testimony, will be inversely as the apparent relative importance of the transaction, the importance which it possesses in his eyes. The real absolute importance will no otherwise contribute to strengthen in his mind the impression made by it, than in as far as its eventual importance happens to be apparent to him, and to be the same in the instance of that particular individual as it would be to an average individual in his place.

Nor, in ordinary instances at least, will the importance of the fact, any other than its relative importance with respect to the percipient witness himself, (that is to say, its connexion, real or supposed, with his own happiness), afford security for permanence and accuracy of recollection.

The state of the witness's mind at the time

* Or, to speak more correctly, instead of the day of the examination, we should rather put the day on which the recollection of the witness came to be pointed to the subject, by the information that his testimony, in the judicial form, would be called for.

is another circumstance by which the strength of the impression made by the transaction at the time, and thence the strength and accuracy of his recollection of it, cannot but be in a very considerable degree influenced. If, by business of a more interesting nature to himself, his attention be pointed another way, — especially if, by the urgency of it in point of time, his mind have been put into a *hurry*, — the impression made by the transaction in question may be slight, indistinct, and fleeting, and his recollection of it proportionably uncertain and confined; although, in other circumstances, the impression made by a transaction of that same nature might have been sufficiently strong, distinct, and permanent.

A still better, and in every case without exception a more trustworthy, lot of evidence, than can be constituted by judicial testimony alone, (how well soever the examination be conducted), is that which consists of the judicial testimony of the same person, with an article of casually-written evidence of his inditing (a letter or memorandum of his penning) at the time (or, if after, the sooner after it the better) for his assistance: the script being at the same time produced, or, at the demand of either party, ready to be produced. Against incompleteness on either side, there is the security afforded by examination and cross-examination; against mendacity and bias on one side, there is the security afforded by cross-examination; against simple incorrectness on either side, there is the security afforded by the fortunate script, the fortunate letter or memorandum, the article of casually-written evidence.

This composite sort of evidence, when the written element happens to present itself, may be regarded as a sort of super-ordinary lot of evidence, still better than that which in general passes under the denomination of the best. But, eligible as it is when it is to be had, it would evidently be a vain arrangement to exact it in all cases, or even to place it upon the footing of regular and ordinary evidence; since the existence of it is merely fortuitous, depending altogether upon the free pleasure and accidental disposition, as well as literary endowments, of the witness. If it could be required by law, it would come under the notion of preappointed evidence.*

* A mass of evidence of this description may be considered as constituting either one complex lot of evidence, or two simple ones emanating from the same source: whether it be to be spoken of under the one denomination or the other, is manifestly a mere question of words.

CHAPTER VIII.

OF SUPPOSED WRITTEN EVIDENCE, TRANSMITTED THROUGH WRITTEN; OR TRANSCRIPTITIOUS EVIDENCE.

SECT. I. — *A transcript, what — Modes of transcription.*

ON the occasion of this, as of other modifications of transmitted evidence, the main objects of inquiry are still two: 1. What shall be received? and, 2. Whatever comes to be received, by what consideration shall the estimate formed of it, in respect of comparative trustworthiness, be directed?

But, previously to our entrance into this inquiry, the bounds of the object must be previously fixed, and its several modifications distinguished.

By a *transcript*, taken in its largest sense, may be understood any discourse which, being expressed by permanent signs or characters, is proposed as capable of producing, in the way of evidence, the same effect as another discourse, which, being also expressed by permanent signs, is with reference to it termed the *original*.

Under this most general description are comprehended three modifications: —

1. A transcript which is such *in tenor*: a copy taken *verbatim et literatim*.

2. A transcript *in purport only*, without being such in tenor. Couched in a set of words more or less different, it contains what is looked upon as conveying precisely the same sense. To this head belong *translations* made into other languages.

3. A transcript *in effect only*. Not professing to contain so much as the purport of the original, at any rate not the whole of the purport, it professes to contain that which, with reference to the purpose in question, is sufficient for the purpose. To this head belong *extracts* and *abridgments*.

A transcript in tenor is a transcript both in purport and effect: a transcript in purport is also a transcript in effect.

A transcript in tenor is that modification which seems the most apt to be presented by the word; but the others have little less claim to consideration, and they also may be naturally expected to be considered under this head. Let this be examined in the first place. Whatever is said in relation to this principal and most proper modification, will serve as a model and standard of reference for whatever there may be occasion to say of the two others.

For making transcripts (understand transcripts in tenor), the word transcript being taken in the most extensive sense, there are divers modes, performed by so many correspondent operations. Not being altogether upon a par in respect of probability of correctness, they require on that account to be distinguished.

1. One is, writing, in the more common and confined sense of the word: writing with pen

and ink. This is the most in use, except in the case where transcripts of the same original are required in large numbers, as in the case of

2. Printing: including the old-established mode by moveable types, and the mode of modern invention in solid masses, called stereotypage.

3. Engraving, in the case where the characters are to be taken off in the way of impression: as in the ordinary case of engraving on copper, pewter, wood, glass, &c.

4. Sculpture: in the case where no impressions are meant to be taken off.

5. Painting in various ways: which is but an elaborate mode of writing, comparatively of little use.*

In the case of the recently invented mode of writing with two or more pens at once, the distinction between original and transcript has, it is evident, no place: except in so far as, by an independent act of authentication, one or more of such draughts or copies should come thus to be distinguished from the rest.

So in the case of the anteriorly invented mode of taking off impressions from writing.

As between one mode of transcription and another, the probability of correctness, fraud apart, will depend on the following circumstances:—

1. The number of persons employed in the making and verification of the transcript.

2. The degree of attention requisite, and naturally to be expected, on the part of each.

* Add to these *lithography*, which, when this work was written, had scarcely been applied to the multiplication of copies of a written document.—*Editor*.

3. The degree of publicity with which errors in general will, in the instance of each, be likely to be known and noticed.

On all these accounts taken together, printing seems to present a superior chance for correctness, in comparison of writing.*

As, by writing, a transcript may, for practical purposes, be, by means of due examination and verification, put upon a level with the original; so may printing, and with still greater facility and certainty.

* Why so? 1. Because, in the natural state of things, the printer, having no particular interest in any legal use to which it may happen to the document to be applied, occupies in this respect a station analogous to an official one. By a printer I mean a person exercising his function in the ordinary way of trade: not to speak of a printer employed in the printing of laws or other legal documents, by authority of government. 2. Because the printer is in every instance either actually known, or capable of being known, as the workman of his own works: his livelihood depends upon the reputation of them in point of correctness; and the correctness or incorrectness of them is subjected to the eyes of a number of witnesses and judges greater, beyond comparison, than usually has place in the case of any transcript performed by hand.

Superior as this mechanical mode of imitation is in the character of a security against incorrectness, it is, at the same time, deficient in the character of a security against spuriousness: but, in this character, nothing is more easy than to put it upon a level with a manual script or transcript; whatever mark of authentication (signature of the name, for instance) serves for impressing the character of authenticity upon the whole tenor of a sheet of manuscript, will serve, in a degree not inferior, for impressing the like character upon a sheet of letter-press: will serve, and in a degree considerably superior. On an instrument written in manuscript, interpolations and other alterations are introducible but too easily, especially if performed by the same hand: in the case of letter-press, any such alterations are as yet, perhaps, without example, and might, at any rate, be made impracticable.

In the case of laws, and all other documents of a public nature that are consigned to print, the printed copies ought to be placed, by appointment of law, upon the same level as the original.

Reason. In the case of laws, the printed copy is the only standard to which access is rendered possible to the people, who, at their peril, are bound to pay obedience to them.

In whatsoever cases forgery in the way of writing is made punishable, forgery in the way of printing, for the same purpose, ought to be made punishable in the same manner.

Examples :

1. Forgery of laws : whether in the way of fabrication or falsification.

2. Forgery of a deed of administration : such as proclamations, nominations to offices, orders issued to public functionaries.

3. Forgery of articles of intelligence, or advertisements, in a newspaper published under the direct orders of government.

4. Forgery of articles of intelligence, or advertisements, in any private newspaper ; the appearance of the paper current under that title being counterfeited by a person other than the accustomed publisher.

Reason. In the case of fraud, if any one of the possible modes of transcription were left unincorporated in the penal consequences, fraud in that shape would be without a check ; and being, as often as it succeeds, alike mischievous, in whatever shape, there is no reason why it should be exempted in one shape, more than in another.

In regard to a transcript professing to be such in tenor, a distinction must be taken be-

tween a transcript verified, and a transcript unverified, or (which comes to the same thing) not known to have been verified.

By a transcript verified in tenor, I understand a transcript, the conformity of which (*i. e.* of the tenor of it) to the tenor of the original, has been sufficiently established for every judicial purpose; at least for the judicial purpose to which, on the occasion in question, it is proposed to be applied.

Verification is to a transcript, what authentication is to an original. By what means this effect may most advantageously be produced, is a topic of consideration that may be posted off to a separate head, with as much advantage, and with as little inconvenience, in this case as in that other, and for the same reason.*

Supposing the transcript verified, — verified according to the import of the term as just fixed, — it thereby becomes dismissed in effect from the present subject. It is *alter et idem*, a perfect equivalent for the original; it can no longer be considered with propriety, with consistency at least, in the light of makeshift evidence.

What follows is, therefore, to be confined in its application to the case of a transcript not verified: either not known to have been verified by any means, or at least not known to have been verified by sufficient means.

SECT. II.—*Sources of untrustworthiness in transcriptitious evidence. Hearsay and transcriptitious evidence compared, in respect of probative force.*

APPLIED to transcriptural evidence, the

* See Book VII. AUTHENTICATION.

description of the characteristic fraud, — the fraud liable to be practised without detection, if the transmitted evidence were to be received on the same footing as the original, — is as follows. A man falsifies a real original, or fabricates a spurious one, to the end that, a transcript (here understand in tenor) being made of it, the effect of a forged script may be produced; at the same time that, the falsified or spurious original being destroyed, and thence no longer producible, the fraud may by that means pass undetected.

In the case of the characteristic fraud, as above described, the falsity, so far as the written evidence is concerned, is confined to the extrajudicial part of the evidence. The object is distorted, or a fallacious object is fabricated, or the true one falsified; but the medium (for any thing that appears) is correct and pure.

Here, however, as elsewhere, though complicity on the part of the writer of the transcript (privity, which is as much as to say complicity) is not of the essence of the fraud, neither is it excluded by it. The fraud may have been committed, and, having been committed, may ultimately, or for the time, have succeeded, whether the vice of the original was or was not known to the maker of the transcript, at the time of his making it.

Setting aside the characteristic fraud; in the case of this, as of other transmitted evidence, for one source of true information, there are two sources of untrustworthiness and deception: 1. If there be an original from whence the transcript was made, that original may have

been spurious, fraudulently altered, or simply incorrect: 2. The pretended transcript may have had no original, or, being taken from an original, may by fraud or by accident be incorrect.

To be spurious or incorrect, whether from mendacious design or from accident, is what may have happened (it may be said) to any single script, considered in the character of an original, or pretended original; and on that account, these causes of untrustworthiness ought not to be set down to the account of the supposed transcript, as such. True: but in the case of a script purporting to be an original, and chargeable either with spuriousness or incorrectness, it may happen to it to wear upon the face of it marks of the spuriousness, or marks of the incorrectness, such as upon the face of a transcript would not be equally open to observation.

Moreover,—in the case where the script, to present the appearance of an original, would require to present the appearance of being authenticated, (for example, by the person or persons whose discourse it purports to be, with or without the signature of any other person or persons in the character of attesting witnesses); if the supposed transcript were, without having been verified, to be received on the same footing as an original; a person intending fraud would find a much better chance of success and safety in the making of a pretended transcript of the tenor in question, than in the fabrication of a spurious original, or the fraudulent alteration of a really existing one; since the means of detection capable of being afforded by the spurious signatures in the one case, and the

obliterations, additions, or substitutions, in the other, would all be avoided by the expedient of the pretended transcript.

So far as simple incorrectness, the result of accident, clear of design and mendacity, is concerned, this species of transmitted evidence, supposed written through written, will appear much superior in trustworthiness to hearsay evidence; and that, whether the supposed script which is the supposed source of the evidence, or the indubitably existing script constituting the medium through which the other is supposed to be conveyed, be considered.

1. As to the supposed original (whether really existing or not), it may either be of the nature of preappointed evidence, or of the nature of casually-written evidence. If it be of the nature of preappointed evidence, the trustworthiness of the discourse contained in it, is, by the supposition, placed, in one way or other, upon a superior footing. The lowest footing on which it can stand, is that of casually-written evidence: and this (as hath already been seen) presents, in the nature of it, a security against incorrectness, superior to that which naturally belongs to oral discourse. Writing, in the very nature of the operation, requires a degree of attention and recollection more than is required in speaking.

2. On the part of that one of the two persons concerned, whose writing constitutes the medium through which the supposed tenor of the original is transmitted, — the superiority of this modification of transmitted evidence as well over supposed oral through oral as supposed written through oral, is easily discernible.

1. In the case of supposed oral through oral; the judicially-reporting witness, at the time when the supposed extrajudicial statement presented itself to his ear, caught it as he could, caught it as it flew. He may have misconceived it from the first: he may have forgotten it in any part, or misreclected it afterwards. The writer of the transcript has the original all along before him, and commits not to writing so much as a word till he is satisfied that his conception of it is just: and no sooner is a word thus fixed, than the preservation of it is placed on a ground much stronger than any that could be given to it by the firmest memory.

2. In the case of supposed written through oral, the judicially-reporting witness may or may not have had his own time for the forming of his conceptions in relation to the contents of the script. But, let the time actually taken by him have been ever so sufficient; whether with any, and what, degree of correctness those conceptions have at the time of his deposition been preserved, depends altogether upon the power, the relative power, of his memory.

Supposing fraud entirely out of the question; in a practical view, the trustworthiness of a transcript will be but little inferior to an original. There are two cases in which an error is of no practical importance: 1. when the words it falls upon are of no practical importance: 2. when, though the importance of the words it falls upon be ever so considerable, the correction requisite for it is sufficiently indicated by the context.

The oftener a series of words comes to be

repeated, the less probable it is that an unintentional error in respect to any given words should be repeated in each instance: and if there be but a single instance in which it fails of being repeated, the true reading remaining in that instance will commonly serve for the correction of the false readings in all the others. This, of course, will hold equally good, whether in the original script the repetitions were, or were not, necessary to the purpose. Hence an advantage resulting from repetitions that otherwise would be useless: an advantage, though such a one as shrinks to nothing when compared with the disadvantages.

The more rare it is for a mere unintentional error of the transcriber to be productive of an incurable error in the sense, the stronger the indication given of fraud, where the error is material, and material in such a way as to be subservient to any assignable sinister purpose.

On the part of the transcriber, the faculty of conception being so amply assisted, and the use of the faculty of remembrance superseded; whatever danger of incorrectness from this source remains open, depends upon the accidental deficiency of the faculty of *attention*. From the consideration that this is the faculty most exposed to fail, some light may be thrown on the question, which of the three shapes, omission, substitution, addition, (in case of honest incorrectness) the inaccuracy seems most likely to take.

1. Omission presents itself as being the most natural. On the part of any given word in the original, a momentary failure of attention to that word may have a correspondent omission

for the result: and in this case, (if a failure of the conception be altogether out of the question), a larger portion of a line may with almost equal probability, an entire line with still greater probability, be the result.

2. Substitution of one word for another, (in general by means of the substitution of this or that particular letter for another), seems nearly, if not altogether, as probable as simple omission. What renders it the more probable, is, that this species of inaccuracy is more apt than the preceding to originate in misconception. It may be referable in a greater or less degree to misconception, if, the transcriber being a man sufficiently acquainted with the subject to form a judgment, the transcript, deviating in this way from the original, presents, notwithstanding, an intelligible sense. If the sentence altogether presents either no sense at all, or none but what is plainly absurd and irrational, the transcriber not being altogether disqualified from judging, it is to a failure of attention, and that alone, that the inaccuracy seems referable.

3. Addition of a word, — insertion of a word to which no correspondent word exists in the original, — is a mode of inaccuracy not altogether without example, but much less frequently exemplified than either of the two others. Judgment, attention, applied to the subject, applied to the original script, cannot be the cause of an inaccuracy of this nature: the cause of it, when it does take place, must be sought for in the imagination: it must be considered as a product of the imagination, a production which finds its way into the tran-

script for want of that attentive comparison with the original, which, by shewing the original to have no such part in it, would be sufficient to prevent it from being admitted into the transcript.

The use and object of the above distinctions, in so far as they may be found just, is to give facility to the detection of fraud: to serve for the distinguishing of a case of fraud from a case of honest incorrectness. If, in general, insertion be in any degree less apt to originate in accident than either omission or substitution; then, — if, in any individual instance, insertion should happen to have been discovered, — in that instance, should any marks of design (which here is as much as to say of fraud) be discovered, this particularly may perhaps be added to that side of the account.

SECT. III. — *In what cases, and on what conditions, shall a transcript be received in evidence?*

A SCRIPT being tendered in evidence in the character of a transcript from another, that other spoken of in the character of an original; shall it, or shall it not, be received? —

For the purpose of an answer to this question, seven cases must in the first place be distinguished.

I. The alleged original is in existence, producible or consultable, and known to be so.

II. The alleged original is in a state of *expatriation*.

III. The alleged original is in a state of *exprovinciation*.

IV. The alleged original is known to have existed; but is known to be no longer in existence.

V. The alleged original is known to have existed; but whether it be still in existence or not, is uncertain.

VI. It is not known whether the alleged transcript be a transcript or not: *i. e.* whether there ever existed a script, from which, in the character of a transcript, its existence was derived.

VII. The alleged original is known to be in existence, but in the power of the adverse party.

To meet these possible modifications in the relative situation of the lot of evidence, there are three modifications of which the conduct of the judge in relation to it is susceptible.

1. It may be received absolutely and unconditionally.

2. It may be rejected absolutely and unconditionally.

3. It may be received conditionally, or according to circumstances: say received *sub modo*.

This last course will, upon the whole, be found, in most cases, the most advantageous one.

Case I. The original known to be producible or consultable.

Rule 1. Where the original is, at the time, producible or accessible, no transcript or alleged transcript ought to be received without some special reason.

Reason. Because, in point of trustworthiness, and with a view to the danger of misdecision,

no transcript can ever be, strictly speaking, exactly upon a par with the original. If then the original be produced at the same time, the transcript (except in the cases immediately following) is superfluous, and the vexation and expense incident to the production of it, uncompensated: if the original be not produced, the transcript may be deceptive.

Rule 2. Where, on the occasion in question, the original cannot, without a considerable degree of difficulty, be referred to and perused; in such case, a transcript in tenor, purport, or effect, as the case may be, may be exhibited in addition to the original, and at the same time.—Examples:

1. The original, in respect of obsolescence of language, or handwriting, or both, difficult to be conceived or perused, and read with fluency.

2. The original conceived in a language (dead or living) other than the current language: (in this case, the transcript will be a transcript not in tenor, but in purport or effect).

3. Where not the whole of the original, but a particular part or parts only, are applicable to the purpose in question, in the character of evidence: especially if the relevant portions be more or less scattered, and distant from each other. In this case, the transcript is of the nature of an extract or abridgment: a transcript neither in *tenor*, nor (throughout at least) in *purport*, but only in *effect*.

Rule 3. So, where, on the hearing of the cause, for the convenience of consultation, a number of copies are wanted at the same time.

Rule 4. For special preponderant reason, a transcript may, in every instance, under appropriate conditions, be received *instead* of the original.

Rule 5. Such reason will, in every instance, be reducible to some one or more of the modifications of collateral judicial inconvenience (*viz.* delay, vexation, or expense), considered as resulting from the production or consultation of the original, over and above what would result from the production or consultation of the supposed transcript.

Rule 6. Of the cases in which it may happen that the production of the original in the first instance shall be productive of preponderant inconvenience in the shape of delay, vexation, and expense, the following may be examples:

1. Where, at the time in question, it happens to be lodged in a place out of the dominions of the state.

2. Or in a place within some province beyond sea, or other widely distant province, (*viz.* with reference to the seat of the tribunal to which the evidence is to be presented).

3. Where the original script in question forms part of a volume, which cannot conveniently be removed from the repository in which it is kept, by reason that other parts of contents are requisite to be kept in that same place for other purposes.

Rule 7. When (for the avoidance of delay, vexation, or expense) a transcript is received in the place of the original, its faithfulness ought to have been previously established in the most trustworthy manner; or,—if (for the avoidance

of delay, vexation, and expense) not in the manner of the most trustworthy of all,—in the manner the next most trustworthy that shall be compatible with the avoidance of a preponderant degree of such collateral inconvenience.

Rule 8. With reference to the adverse party, the party against whom the lot of evidence is produced; its fidelity will have been established in the most satisfactory manner, when such adverse party, by himself or his more competent agents, having (upon sufficient opportunity of access) compared the transcript with the original, finds the transcript equivalent in every respect to the original, in point of effect.

Rule 9. But no script ought ever to be received (except as by the next rule) in the character of a transcript, in lieu of the original (as above), from the hands of any suitor, without a declaration upon oath, on the part of him or his law-agent, declaring the fact of his having examined it by the original, and of the persuasion he entertains of its fidelity.

Rule 10. If the transcript,—having been examined by the original, and appearing upon the face of it so to have been, by some appropriate official person,—has thereupon been certified to be correct; the party so tendering it in evidence is not bound so to re-examine it: but neither in this case should the declaration of his own persuasion respecting the fidelity of it be omitted; although such persuasion have no other ground than the general consideration of the security afforded by this species of pre-appointed evidence.

Reason 1. A possible case is, fraud on the part of the official examiner, by collusion with the party tendering the evidence.

2. Error on the part of the official examiner, viz. to the advantage of the party, and discovered by him by accident.

Case II. The original known to be in a state of expatriation.

This case is, upon the very face of it, a modification of the first case: but, presenting a demand for an appropriate set of arrangements, it requires to be arranged under a separate head.

In the case of transcriptural evidence, expatriation of the script is analogous to expatriation of the person in the case of casually-written and hearsay evidence. The arrangements demanded, — though, by reason of the different nature of the subject matter, they will not *in terminis* coincide with the arrangements suitable to those two preceding cases, — will, under the guidance of analogy, be naturally indicated by them.

Rule. Where, in regard to a script proffered in the character of a transcript, it is ascertained or believed that the original is in a state of expatriation; let the following arrangements await the option of the judge: —

1. To cause the transcript to be sent abroad (viz. to the place where the original is kept), for examination, and attestation of verity.

2. To cause a fresh transcript from the original, duly verified, to be imported and produced.

3. To cause the original itself to be imported

and produced, if practicable, and without preponderant inconvenience.

Any one of these arrangements to be taken, or none, according to the importance of the cause, the importance of the article of evidence in question in relation to the cause, the degree of persuasion respecting the faithfulness or unfaithfulness of the transcript, and the comparative degrees of inconvenience in the shape of delay, vexation, and expense, attached to the three respective courses.

A time to be declared, subject to abbreviation or enlargement for sufficient cause, at the expiration of which, if the intended operation chosen (as above) be not performed, it shall be regarded as impracticable.

The provisional decision to be in favour either of the party proffering the evidence, or of the adverse party: and in either case, with or without security taken for eventual reinstatement.

Observations. Unless the non-existence of the alleged original, or the faithfulness of the transcript in all material points, be believed,—even although there should be no other direct evidence of the existence of the original than the judicial testimony of the party, nor of its faithfulness, than his declared belief,—the judge will scarcely refuse to pronounce the provisional decision in favour of the faithfulness of the transcript, taking security for reinstatement in case the result of the reference so made to the original should prove unfavourable. For the reasons why, see the examination of Case VI. further on.

Case III. The original known to be in a state of exprovinciation.

This case is, also, upon the face of it, a modification of Case I.: a modification closely analogous to the last preceding case, the case of expatriation. The arrangements requisite to be taken, will, in their general description, coincide with those already brought to view in that last-mentioned case; but, in detail, the description of them will obviously require to be, in various particulars, different. In the case of expatriation, every thing that can be done is more or less dependent upon the facilities given or withholden by the government in the foreign state: in the case of exprovinciation, it depends upon the arrangements taken in that behalf by the government in the state in question, in the same state.

Rule. Where, in regard to a script proffered in the character of a transcript, it is ascertained or believed that the original is in a state of exprovinciation; let the same arrangements as in the case of expatriation await the option of the judge: subject to such arrangements, if any, as may have been taken in this behalf by the legislator, the common sovereign of both provinces.

Observations. As far as local distance is concerned, the quantum of delay, vexation, and expense, attendant upon that circumstance, may be as great in the case of exprovinciation as in that of expatriation: the only uniform difference between the two cases consists in this, viz. that, in the case of exprovinciation, access to the original, or the production of it, will be at the command of the government of

the country in which the transcript is thus proffered; in the case of expatriation, not.

Case IV. The original known to have existed, but to be no longer in existence.

Rule. Where, in regard to a script produced in the character of a transcript, it is known that an original script from whence it was transcribed was once in existence, but that it is no longer in existence; let the transcript be received in place of the original, subject to whatever considerations may be alleged in diminution of its trustworthiness.

Reason. Neither fraud, nor material incorrectness, are to be presumed: both cases are, in comparison, extremely rare. In this case, forgery in the way of fabrication is by the supposition out of the question. An original to the transcript there really was: the only question is, whether the representation given of it by the transcript be substantially a faithful one. If for every thousand transcripts there have been one unfaithful one, and no more; on this supposition, the probability of misdecision, even supposing the unfaithful transcript to obtain credence, is but as a thousand to one; whereas, on the other hand, if the transcript be necessary to warrant the decision prayed for on the side of him by whom it is proffered, and being so, is rejected, misdecision, in case of rejection, is a certain consequence.

Or say thus: If, in every ten transcripts, of each of which the original has ceased to be in existence, whereupon the transcript has been proffered in evidence in its stead, there has been one unfaithful, and no more; then, in case of admission, the probability of misdecision

is, at the utmost, but as one to ten; whereas, in case of rejection, it is certain.

Previously to the deperition of the original, no fraud in any shape can have existed, unless at the time of the fraud the deperition had been foreseen; which it could hardly have been, unless an intention of procuring such deperition had formed a part of the fraudulent contrivance: no fraud in any shape, either by, or by the help of, purposed infidelity on the part of the transcriber; or by the like on the part of an examiner; or by forgery in the way of falsification, committed by another person at a time posterior to the examination: always understood and supposed that, according to the known dispositions of the law, so long as the original is in being, the transcript cannot be received on any terms; or not but upon the terms of being confronted with the original, in case of dispute.

No sooner, however, is the deperition known, than the check which the existence of the original opposed to forgery in the way of falsification is at an end. The transcript becomes, in that event, at that period, exposed to falsification: to wit, as much as an original would have been, but no more: the transcript, as such, is not on this score less trustworthy than an original would have been in its place.

Here, if the author of the falsification was the party by whom the transcript is proffered in evidence, the most natural case is, that, for the purpose of giving room for the falsification, it was by him, or by his means, that the deperition of the original was procured: but another

possible case is, that the deperition took place without his participation; for example, by accidental fire, or in some other way by mere accident; and, the opening to fraud being thus made, then it was that it occurred to him to take advantage of it.

If it be clear that, from the time of the deperition of the original down to the time of the production of the transcript, the transcript has never been either in his custody, or, to any such purpose, in his power; all suspicion of fraud on his part of course falls to the ground.

As to mere *accident*; in one point of view it should afford no reason at all for the rejection of a proffered transcript in this case. For (design being by the supposition out of the question) an incorrectness, even supposing it material, is not more likely to operate to the prejudice of one party than of another: the chances of advantage and disadvantage being, therefore, equal, and that with reference to each party, their situations are respectively the same as if there were no chance either of advantage or disadvantage on either side.

But this circumstance is not altogether destructive of all probability of misdecision from this source. Whether the incorrectness be taken advantage of or no, will depend upon that one of the parties in whose custody or power the transcript is: if the error be to his disadvantage, and he aware of it, he will either not produce the transcript at all, or not without pointing out the error, and claiming the benefit of its being corrected; if it be to his advantage, and his disposition be to such a degree dis-

honest, he will in that case take advantage of the error, although he had no part in the production of it.

If, from the above considerations, the cases on which the investigation turns seem far-fetched and improbable; the more far-fetched and improbable the cases appear on which the investigation turns, the clearer will be the impropriety of any rule, which, in the case supposed, should pronounce the exclusion of transcriptural evidence.

Case V. The alleged original known to have existed; but whether it be still in existence or no, is uncertain.

Rule. When, in regard to a script produced in the character of a transcript, it is known that an original script from whence it was transcribed was once in existence, but whether it be still in existence is uncertain,—let the transcript be received in evidence: but, in the framing of the decision grounded on the evidence, for the avoidance of irreparable injustice, let the same arrangements await the option of the judge, as in the case where (as above) the original is known to be in a state of expatriation.

Case VI. A script purporting upon the face of it to be a transcript, is proffered as such, but the existence of the supposed original has not been ascertained.

Rule. It may sometimes happen that a script purporting or appearing upon the face of it to be a transcript taken from some original of the same tenor, purport, or effect, shall be proffered in evidence to serve in place of the supposed original; at the same time that no other direct

evidence of the existence of such original is producible. In such case, let such supposed transcript be received in evidence for what it appears to be worth; subject always to the double uncertainty, whether any such original as it purports to have been transcribed from ever existed, and whether, supposing such original to have existed, the supposed transcript in question be a sufficiently faithful transcript of it.

In some modifications of this case, the persuasive force of an article of evidence of this description may be of itself very slight and inconsiderable. At the worst, however, it will operate as a lot of circumstantial evidence, evidentiary of the existence of a correspondent original; and it is of the nature of circumstantial evidence to be susceptible of any degree of persuasive force: and, as circumstantial evidence, be it in what shape it may, cannot be too slight to be received, in company with other evidence, so neither can it in this.

If the supposed original be an article of casually-written evidence, it may be extremely difficult to determine whether the script in question be a transcript of an original of the same tenor or effect, or whether it may not itself be an original, not having been transcribed from any other. (See below, sect. 5.)

In the case where the supposed original (supposing it to exist) must have been an article of preappointed evidence, it will in general be sufficiently apparent that the script in question, the alleged transcript, if it had not an original, could not itself be an original. Why? Because the original, being by the

supposition an article of preappointed evidence, (for example, an instrument of agreement or conveyance), will have been furnished with some intrinsic marks of authentication, prescribed or customary, such as could not, without forgery, be given to a transcript.

In this case, another doubt may also arise concerning the alleged transcript, viz. whether it be a transcript from an original actually authenticated, or only a preparatory sketch or draught of an instrument to the same effect, not at that time authenticated. In the former case, a correspondent original must, by the supposition, have existed: in the other case, though intended, it may never have existed. In the former case, it is of the nature of that species of circumstantial evidence, distinguished on a former occasion by the name of *posteriora priorum* evidence; on the other, of the opposite nature, *priora posteriorum* evidence.

If, upon the face of an original of the nature in question, a certain formulary of attestation (whether by positive appointment of law, or by custom) be generally to be found; the difference between a transcript and a preparatory draught will, in general, not be difficult to decide: if it be a transcript, the formulary of attestation will hardly have been omitted in it; if it be but a preparatory draught, no such formulary can make part of it.

The most suspicious modification of this case is where a party proffers in evidence a script, which, according to his account of it, is a transcript, in tenor, purport, or effect, made from an original instrument, of the nature of preappointed evidence, (contractual, for instance,

or say an agreement or conveyance); which instrument, he says, was once in his possession (or in the possession of some person to whose interest he succeeds in quality of representative, suppose his ancestor or testator), but is now, to use the common expression, *lost: i. e.* not that he knows of its having perished, or has any particular reason for supposing it to have perished; but that, after every search he can make, he has not been able to find it, nor can think of any place, as yet unsearched or uninquired at, at which he sees any probability of its being found.

This sort of case lies obviously open to the characteristic fraud. It may be that no such original instrument was ever in existence; and that the party, not choosing to run the hazard of forging, in the way of fabrication, any pretended original to the same effect, makes and produces this pretended transcript, regarding the fraud in this shape as being more promising in point of success, or less exposed to danger.

What, on the other hand, may also be, is, that a genuine original to that same effect was once, and perhaps still continues to be, in existence, but, by the operation of some cause altogether out of the reach of his knowledge or conjecture, either was destroyed, or was concealed or removed out of his knowledge. But, as neither judicial mendacity, nor fraud in any other shape, ought to be *presumed, i. e.* regarded as certain, without special inquiry and consideration into the idiosyncrasy of the case; the state of things in question, though a ground of suspicion, forms no sufficient ground for the absolute rejection of the evidence.

This, in the most suspicious form that it can assume, is but a modification of self-serving evidence; of which, even in its most questionable and least trustworthy shape, it has already been in some degree, and will hereafter* be more fully, shewn, that it ought not in any case to be absolutely excluded; much less where, as here supposed, the party is subjectable to *viva voce* cross-examination upon oath.

By whose hand was the alleged transcript made? By that of the party by whom, in the character of a transcript, it is proffered in evidence? It is in this case so obviously exposed to suspicion, that it seems little in danger of being accepted for more than it is worth. Is it in the hand-writing of another person? Then there must have been some other person concerned in the business, and (if not imposed upon) privy to the fraud. If, in respect of punishment, a fraud of this kind is placed (as it ought to be) upon a level with ordinary forgery; in such case, the danger incurred by the admission of this transcriptural kind of evidence differs but inconsiderably from the danger inseparably attached to the admission of preappointed but unregistered contractual evidence in general; since all such evidence, being unregistered, is liable to be forged.

If the party disguises his hand, to make it look like that of another person, a question that cannot fail to be put to him is, who the writer is. In this case, whether he names a particular individual, or declares that he knows not who it is, here at any rate is a case of judicial men-

* Book IX. EXCLUSION.

dacity, superadded to a fraud which ought likewise to be considered as a modification of forgery. If the person named by him be a living individual, then the individual is living to contradict him: if an individual now dead, there will be other writings, the genuine writings of that same individual, to confront with this forged and spurious script: if it be an individual of whose hand no specimens are to be found, then comes the species of counter-evidence constituted by the improbability of the alleged fact, viz. that, of a hand expert in writing, this, and no one other production, should be to be found.

Supposing the instrument genuine, it will seldom happen that no circumstantial evidence, evidentiary of the occasion of executing it, and the probability of its having been executed, should be to be found. In proportion as the existence of this sort of confirmative circumstantial evidence appears probable, the unforthcomingness of it will constitute an objection to the trustworthiness of the supposed transcript; and an objection too obvious to be in danger of being overlooked.

By all these considerations, not only the danger of deception in case of fraud, but the probability of an attempt at deception by fraud, will surely appear to be reduced very considerably below — I will not say certainty — but below an even chance. To facilitate conception; out of a hundred cases in which evidence of this sort is proffered, in ten, and no more than ten, it is accompanied with fraud, and in one out of these ten the fraud succeeds. Thus stands the matter, on the supposition of the

admission of the evidence. In ninety cases out of every hundred, right decision, justice, is the consequence ; in one only, misdecision, injustice. Next, suppose a peremptory exclusion put upon this species of evidence. Here the proportions are reversed : in one instance, misdecision, injustice, is prevented ; in ninety instances, right decision is prevented, injustice is produced.

If the above ratios appear too great, take lesser ones : but they will hardly be taken, by any body, so small, but that, in his view of the matter, the probability will be still on the same side, the practical result will be still the same.

Case VII. The original in the power of the adverse party.

Observations. In this case, so long as the party in whose hands the original is, does not produce it, the existence of the alleged transcript being notified to him, the fidelity of the transcript is thereby proved, as against such detainer, by a most satisfactory species of evidence,—the virtual admission of the party interested in the proof of unfaithfulness on the part of the transcript, if in truth it were chargeable with any such defect.

That a script, or any thing else, should *have been* in the power of the party in question, or any other individual, is one of those events against the happening of which, be they ever so undesirable, no industry on the part of the law can afford security. But that a script, or any thing else, the forthcomingness of which is requisite for the purposes of justice, should *continue* unforthcoming notwithstanding, and at

the same time continue in existence, is a state of things which cannot have place from any other cause than an inexcusable imperfection, a voluntary imbecility, in the system of procedure. Supposing it (for argument's sake) put out of doubt, that a man, having any such article in his custody or power, wilfully persists in the non-production of it,—no torture that he chose to submit to, rather than comply in this respect with the obligations of justice, could be too severe: at no price should it be permitted to a man to purchase the privilege of flying in the face of law, and committing a known injustice.*

A possible, and not very extraordinary case, is this: The original, having been in the hands of the adverse party, has passed out of his hands, and altogether out of his power, without any design of eluding the probative force of the transcript, and, in a word, without any default of his in any shape. In this case, he will naturally be able to shew, if it has perished, that it has perished; if not, into what other hands it has passed. If, instead of this, he declares (being, of course, judicially examined) that he knows not what is become of the original; in such case, although the declaration should be true, no injustice can reasonably be to be apprehended from considering the verity of the transcript, as between them two at least, as sufficiently established. If, after this de-

* English procedure, with the most perfect complacency, licenses injustice in this shape, to a most deplorable extent. But of this kind of imperfection the display belongs, not to the present subject, but to that of *procedure*, and the head of FORTHCOMINGNESS.

claration, he declares moreover (under the same securities for veracity as are applied to the testimony of an ordinary witness) that he does not believe the alleged transcript to be faithful, but to be unfaithful in such or such specified points; here comes a contrariety of evidence, a difficulty under which the judge must form, on this as on other cases, the best judgment in his power.

In this case, — as between these two parties, the withholder of the original, and the holder of the transcript, — it manifestly makes no difference, whether the original be produced, that, by comparison with it, the transcript may be verified; or whether, on the non-production of the original, the verity of the transcript be declared to be sufficiently ascertained.

As between them two, yes: supposing the holder of the transcript satisfied of its verity, — satisfied, consequently, that the original itself, if produced, would not be more favourable to his cause. As between them two, yes: but not as between other persons. If it were understood that, on the terms of establishing the verity of an alleged transcript, the possessor of the alleged original had it absolutely in his power to protect it from the scrutiny of the judge, and to make the alleged transcript good evidence against other persons, in the same or other suits; the effect of forgery might thus be rendered attainable, without any of the risks. In pursuance of a preconcerted scheme of collusion, in an action brought on purpose, a pretended transcript of a deed of any description and to any value is proffered in evidence by

the plaintiff; notice for the production of the original is given to the defendant; the defendant forbears to produce it; and thereupon the character of an original, an original confirmed by judicial inquiry, is given to the fraudulently pretended transcript.

SECT. IV.—*Arrangements for securing the fidelity of transcripts.*

Rule 1. Upon every transcript, made by a public scribe in the course of office, let a pledge of correctness be entered upon the face of it, as follows:—

1. The name of the transcriber, written by his own hand.

2. The designation of the actual time of taking the transcript; expressed by the day, month, and year.

3. The designation of the place at which the transcript was taken.

Rule 2. If, of the same transcript, one part be written by one hand, another by another, the designation should be repeated every time it thus changes hands; but, the name once given at length, the initials will afterwards be sufficient.

Rule 3. This obligation ought equally to be extended to professional scribes; for example, to notaries, conveyancers, attorneys, and their clerks.

Rule 4. Where, either at the time of making the transcript, or afterwards, it comes to be examined by any person other than the transcriber; the same pledge of correctness should be given by such *examiner* likewise.

Rule 5. And this, whether, on the part of the transcriber, the transcript bears on the face of it any such pledge of correctness, or not.

Rule 6. Of every such official, as well as of every such professional transcript, as well the writer as the examiner should at all times be subject to judicial examination, touching the fidelity of the transcript, and the truth of their respective marks of verification, as above.

Rule 7. If, notwithstanding all such external evidence, the fidelity of the transcript be in dispute, and the original be still forthcoming; the examination of the transcript by the original, as touching the points in dispute, may be made at any time, by or under the eyes of the judge.

Taken on the whole, the uses of these entries are not unobvious.

1. To afford a security against incorrectness through negligence. If error appears, it appears at the same time who the person is, to whom it is to be imputed.

2. To afford a security against fraud. If fraud have any share in the production of the error,—being the work of design, it cannot but be a material one, so as to operate to the prejudice of some right. But, the more material it is, the more strongly it points the eye of suspicion upon the person of the transcriber; and there he is, to answer for it. If the entry be not the writing of the person whose writing it purports to be, it is then a forgery: and, in this case, the punishment and peril of forgery attach upon the fraud.

3. A collateral and inferior use, in the case of the transcriber, is, to serve as an index and

measure of his capacity and diligence, by shewing the quantity of business dispatched by him in each given portion of time.

The use of the designation of the time, coupled with that of the place, is to throw difficulties in the way of forgery. The forgery will be detected, if it should appear that, on the day in question, there was no such person writing in that office, in that place. And, as to the clerk himself whose hand is thus forged, it will be easier to him to say with assurance that he wrote no such paper on this or that particular day, than that he never wrote any such paper in the whole course of his life. At the particular time in question, it may happen to him to recollect that his whole time was occupied about other business.

In the case of the examiner's mark of attestation, an effectual indication of forgery will be afforded, should it ever appear that, before the time therein specified, the original had perished.

In the case of an official transcript, the designation of the place may, at first sight, appear superfluous. The situation of the official house is a matter of universal notoriety; and the official books and documents are kept at the official house. But,

1. In some cases, the office itself is ambulatory; as in the case of military offices, by sea and land.

2. The transcript may be of the nature of those which are destined to be sent out of the office; such as circular letters, and the like.

3. The document in question, though designed to be kept in the office, may, on some

unforeseen occasion, be sent out of it, or, by accident, separated from it. The designation of the place will in this case serve for the replacement of it.

4. The designation of the person is scarcely complete without the designation of the place. Of the names called proper names, there are few but what are in fact common to many persons.

Of the above-proposed arrangements, the description is simple, the efficiency obvious, and the trouble not considerable. The application of them may at least be considered as forming the matter of a general rule. If, in this or that particular instance, the labour should appear to outweigh the utility, in every such particular instance it will be easy to discard them by a special rule of exception adapted to the case.

In the case of an official transcript (as above), a transcript having for its writer, or examiner, or both, a public functionary; if the above arrangements for the security of individual responsibility be established, the security afforded (as above) by the relative date of the judicial deposition, will be the less material; inasmuch as the certificate or attestation of transcription or examination will never have been attached to the transcription, but under the persuasion of eventual liability to judicial scrutiny.

On that supposition, the case to which it applies with particular efficiency is that where the examiner has not been any such public functionary, but some unofficial individual; such, for instance, as a professional agent of this or that one of the parties in the cause; or,

in case of an instrument of conveyance, or other contract, the man of law, or the clerk of the man of law (notary, attorney, or conveyancer), by whom the original was drawn, or who, in the way of his professional functions, had had occasion to advert to the contents of the original for any other purpose.

With the help of this check, so strong is the collective body of security thus afforded, that the trustworthiness of an examiner of the least trustworthy description, may be raised by it to a level superior in the eye of reason to a person of the most trustworthy description to whom, for want of the requisite arrangements, the security for individual responsibility is found not to apply. For example, the testimony of the party by whom, and consequently in favour of whom, the supposed transcript is proffered in evidence, will, under these circumstances, present a better claim to credence than can be presented by any supposed official transcript; nay, even by any transcript, of which, though it be known that it was made or examined in this or that particular office, and consequently by one or other of the clerks that at one time or other have been employed in that office, it is not known by what one in particular of those clerks it was written or examined.

SECT. V.—*How to distinguish between original and transcript.*

IN the case of preappointed evidence, all difficulty from this source is, or at least naturally will be, endeavoured to be provided against and prevented.

But, in the case of casually-written evidence, the case may remain exposed to every difficulty.

If it be a letter, that letter will naturally be signed by him whose discourse it is. But, among persons in habits of intimacy with each other, and perfectly acquainted with each other's hands, the formality will often have been omitted.

But a script appears in form of a letter, and that letter signed by a name. To a person sufficiently acquainted with the handwriting, it may be proportionably clear that it is the handwriting of the individual whose name it bears : but, to the persons interested in the business, that person and his handwriting are (suppose) alike unknown. In that case, fraud of every kind apart, it cannot assuredly be known to a certainty whether the script be an original or a copy. All that can be said is, that its being an original is the more frequent, and thence in each individual case (setting aside idiosyncratic indications) the more natural and probable, result. For,

1. Considered in an aggregate point of view, the number of letters of which no transcripts are taken, exceeds (it may well be thought) in a prodigious degree the number of those of which transcripts are taken. But the strength of this consideration will depend upon a variety of circumstances : 1. Upon the importance of the subject of the letter : commercial, or non-commercial; relative to business purely private, or to business more or less public, &c. : 2. Upon the prevalence of the faculty and habit

of taking copies of letters, in the country in question, at the time in question.

2. When a transcript of a letter is taken (fraud apart), it is common and natural that upon the face of it it should be so intituled; or, at any rate, that in some way or other an indication should be given of its not being meant for any thing more. On the other hand, this indication is a circumstance to which it may easily happen to be omitted. A letter lies before me : I take a copy of it (no matter for what purpose) for my own use : I know it to be but a copy : what need have I to give the information to myself?

Suppose other persons are meant to share with me in this use ; all of whom are acquainted either with me or with the writer of the original, and with our respective hands. Even in this case, the indication will be apt to appear alike superfluous, and, as such, to be omitted.

3. If the original be no more than a memorandum, written by the writer for his own use, and not addressed to any body, or meant to be sent to any body ; in that case, if a transcript be taken of it by another person, it may be impossible for any third person (otherwise than by examination of one of the persons, the writer of the original, or the transcriber) to give so much as a guess, which was the original, which the transcript. Either, presenting itself without the other, would of course be taken for an original : from the sight of the original alone, no person would be led to conclude that any transcript had been made of it ; from the sight of the transcript alone, no person

would be led to conclude that it was not an original, but a transcript. Such would generally be the case, supposing both of them equally free from alterations and slips of the pen. On the other hand, where alterations and blemishes are visible, from the nature of these blemishes some sort of indication or ground of conjecture respecting the script in question taken singly, as to the question whether it be an original or a copy, may every now and then be discoverable.

In an original, whatever alterations occur will naturally have arisen from a correspondent change in the thought and plan of the discourse. If one word be struck out and another written over it, the word thus substituted will commonly have no resemblance in physical appearance to the word to which it is substituted: especially if, a clause composed of three or four words in connexion being struck through, another clause, embracing also a number of words, be put to serve instead of it.

In a transcript, where any such alterations are perceptible, if the error consisted in the omission of a word or series of words, the correction will consist in the insertion of such omitted word or words; which insertion, the error not having been discovered till the line is finished, will commonly be made in the way of interlineation. If the error consisted in the substitution of one word for another, the improper word will, in general, be a word more or less nearly similar in physical appearance to the proper one.

In short; in an original, if any alterations

are perceptible, they will be such as, being the result of a change of thought, will be indicative of such a change : in a transcript, if any alterations are perceptible, they will not be indicative of any change of thought.

On the occasion of these and all other such diagnostics, a caution as useful as any or all of them put together, is, not to place too implicit a confidence in them : and this for two reasons : — 1. Because, even fraud apart, their conclusiveness is susceptible of an infinity of gradations : 2. Because, if any one were understood to be conclusive, fraud would naturally bend its endeavours to take advantage of the rule. Example : In the natural state of things, fraud apart, an original brouillon may swarm with substitutions and interlineations, to any degree of complication : a transcript will not naturally be infected in any considerable degree with any such blemishes. But, if this were to be understood in the character of a peremptory rule, to which the judge were obliged to conform ; a man who, making a transcript, wished for any sinister purpose to make it pass for an original, would fill it with such blemishes on purpose.

Rule. Where, as between divers scripts emanating from the same original source, a doubt arises which is to be considered as the authentic draught ; as, for instance, between two such scripts, whether the first be a rough sketch preparatory to the original, and the second the original, or the first an original, and the second a transcript (viz. either in tenor or in substance) ; let not the claim of any such

script to be considered as the more authentic, be regarded as fixed by any general rule, applicable to all sorts, or to any sorts, of scripts; except so far as, in the instance of this or that particular species of script, the distinction may have been fixed by an appropriate provision of statute law. But, in each instance, let all such of the contending scripts as can be produced, be produced accordingly; and, from a joint comparison of them all, let the true import of the discourse be collected.

Examples:—

1. Shop-books. Several shop-books kept by the same shopkeeper. In some, the order of the entries will have been purely chronological: in the waste-book and journal. In others, the primary principle of arrangement will be logical; the transactions being classed in groups, sometimes according to the persons, sometimes according to the things, to which they relate: the chronological principle of arrangement being secondary with relation to these logical ones.

In general, an entry belonging to that book in which the transaction is entered before it is entered in any other, will be more trustworthy than the correspondent entry in any other of the books: because the former one will be of the nature of an original, the others no more than transcripts, entered on so many different principles of arrangement. But it may happen that a mistake was made in the prior entry, and that it received correction in a posterior one.

2. Official books of any public office. The documents usually entered in the office being known; the document, as made out in proper

form, will naturally have been preceded in many instances by a short minute or memorandum, indicative of the species of the document which is to be made out, and serving for instruction to the clerk by whom it is to be made out.

3. The documents (if more than one) serving to exhibit a man's last will:—viz. if no sufficient care has been taken by the legislator to stamp the character of authenticity upon a document of a particular description, to the exclusion of all others that are liable to come into competition with it: or if a document, upon the face of it authentic, should come to be impugned on the ground of spuriousness, falsification, or unfairness in respect of the mode of bringing it into existence.

CHAPTER IX.

OF REPORTED REAL EVIDENCE: I. E. SUPPOSED REAL EVIDENCE, TRANSMITTED THROUGH ORAL JUDICIAL TESTIMONY, OR THROUGH CASUALLY-WRITTEN EVIDENCE.

THE inferiority of transmitted evidence, as compared with immediate evidence from the same source, is as manifest in the instance of this, as of any other, species of transmitted evidence. This species of evidence cannot therefore but be ranged under the head of makeshift evidence. At the same time, the cases are numerous, and the description of them extensive, in which the correspondent immediate evidence is not to be had, yet in which evidence from that source is so material, that, in a general view, the admissibility of it, even in the secondary and reported form, is altogether out of dispute.

Of the instructiveness and importance of *real* evidence, a general view has already been given under the head *circumstantial* evidence, of which it constitutes a species. On the present occasion, what remains to be brought to view is the specific description of the cha-

racteristic fraud, and the modifications which this species of transmitted evidence is susceptible of, according to the nature and trustworthiness of the medium through which it may happen to be transmitted to the conception of the judge.

The species of fraud to which this species of makeshift evidence stands exposed, may be thus described. A person (suppose the defendant, or any other person on his behalf, in an expected criminal cause),—applying himself to the thing which, with relation to the principal fact in question, is already become, or which he proposes to convert into, a source of real evidence, — either obliterates or alters the evidentiary appearances presented by it in the state in which he found it, or superinduces upon it fresh appearances of his own production, such as appear to him conducive to his purpose (viz. in the present case, that of exculpating him from the charge).

This, it is evident, is neither more nor less than the sort of fraud which there has already been occasion to bring to view (to wit, in the book on Circumstantial Evidence), under the denomination of *forgery* of real evidence: *alterative* or *fabricative*, as the case may be.

One circumstance is remarkable, as being peculiar in relation to this modification of transmitted evidence. Exposed, as it has been seen to be, to a characteristic fraud, it is so no otherwise than as the corresponding immediate evidence is: the real evidence afforded by the same physical object,—issuing from the same source.

The cause of the difference is, that, in the

case of the other modification of transmitted evidence, there are at least two persons concerned, or supposed to be concerned, in the character of witnesses or sources of evidence: two persons, the one of which (viz. the extrajudicial witness) may, under favour of his exemption from the sanction of an oath, and from cross-examination, put a deceit upon the other (viz. upon the intended judicial witness): such a deceit, from which the judge, armed as he is with those instruments for the extraction of truth, is proportionably defended.

But, to the fraud liable to be practised upon, or in relation to, real evidence, the situation of one cause stands no less exposed than that of another: that of the judge, no less than that of any reporting percipient witness, on whose report, through choice or necessity, he rests his conception of the fact,—instead of the testimony of his own senses, with his own judgment for their assistance.

For this same reason, every thing that relates to the examinability of the supposed extrajudicial witness has no place here. Here there is no extrajudicial witness in the case: in the room of the interrogable or uninterrogable *person*, we have the uninterrogable *thing*.

The personal evidence, by which the supposed real evidence in question is transmitted to the conception of the judge, may wear any of the forms which have already been brought to view. 1. Oral evidence, judicial testimony, delivered or extracted in the judicial, that is (by the supposition) the most trustworthy, mode. 2. Casually-written evidence: minutes taken, descriptive of the appearances exhibited by

the thing — by the source of the real evidence : taken by a private individual, in the situation of an extrajudicial, and not an official, witness, — taken consequently at the time when the evidentiary appearances are freshest and most instructive, or at any late period (if any), when, by the agency of time, they have been rendered less correctly instructive : taken, again, either at the very moment of inspection, or at any succeeding period, and at the end of any longer interval of time. 3. Written evidence taken by a preappointed, and, *quoad hoc* at least, an official, witness : not by the judge himself, but by some person of chosen trustworthiness, appointed for the purpose, either by general and permanent designation of the law, or by special appointment from the judge. 4. Judicial testimony, delivered and extracted in the judicial mode, but grounded and supported by written minutes, containing the result of the inspection : the view itself taken, and the result committed to writing, at a period earlier than that at which the business could have been performed by a judicial presentation, or examination in the first instance.

Comparing with each other the two species of evidence, the original and reported, (bearing in mind the several causes of inferiority observable in makeshift evidence, with relation to the correspondent species of regular evidence), we shall find the difference much less in this, than in any other, instance.

1. The person by whom the reported real evidence is reported, may always be a *preappointed* witness : and that witness preappointed even by the judge. Here then vanishes all danger

of fraud. Of all the several species of make-shift evidence, this is the only one which is not exposed to any variety of what we have called the *characteristic fraud*.

2. The person appointed thus to act in the character of reporting witness, may be, and naturally will be, a person possessed of that appropriate stock of information, which, with relation to the subject-matter of the deposition, will place him in the predicament of a *scientific* witness. The danger of deception on the part of the judge, without fraud on the part of the deposing witness—without any symptom of weakness in his rational faculties—without any other than such of which his intellectual faculties may be the seat,—is thus reduced to its minimum.

To the *moral* trustworthiness of official evidence, (viz. of judicial, the most trustworthy species of official, evidence), he may, and naturally will, add the *intellectual* trustworthiness of scientific evidence. If no appropriate modification of physical science be requisite, the person selected for this purpose will naturally be appointed by the judge; a person known to him through the medium of official relation and intercourse: in the opposite case, some person recommended by the general reputation of appropriate science.

It follows, then, that if, between the immediate and the thus reported real evidence, there be in any case any practically material difference in point of trustworthiness, it can only be in so far as there is something in the particular nature of the real evidence in question, that disqualifies it from being transmitted

with accuracy through the medium of personal report: the perceptions which it affords to a percipient witness being such as cannot, without material alteration, be transmitted through the medium of language.

But, even in this case, the difference in point of trustworthiness will not be so great, as, upon the face of the above statement, it might at first sight appear to be. The judge — the official permanent judge — is not, upon the footing of this arrangement, so correctly and fully informed, as in the case where the information is presented to him in the shape of immediate real evidence. True: but (though *he* is not) his nominee, his deputy, — the person selected by him on the ground of his appropriate trustworthiness, as qualified, for the purpose in question, to officiate in his place, — receives and contemplates the information in its character of immediate real evidence. The decision of the case does not in effect lose the benefit of immediate real evidence: the result of the arrangement is no more than this, viz. that the decision in effect is transferred from the judge in ordinary, to another judge, who, though but an occasional one, may, on the particular occasion in question, for any thing that appears, be regarded as equally fit and competent.

Upon this footing stands the disadvantage which reported real evidence lies under, when compared with immediate real evidence. Considered in another point of view, it may (at least in certain circumstances) appear possessed of an advantage. For the judicial trustworthiness of the official judge; for the probity, attention, and intelligence, brought into action by

him on the occasion,—the public possesses in this case a sort of security, which it possesses not in the other. Suppose in the place of the judge an all-perfect human being, and at the same time, on the part of the proposed occasional judge-depute *ad hoc*, a character considerably inferior in these respects to his principal; the difference and the disadvantage on the side of the reported real evidence, in its comparison with the immediate, may be very considerable. On the other hand, suppose any considerable degree, though it be no more than the ordinary degree, of deficiency in point of trustworthiness on the part of the ordinary judge; or (what is at once an equally natural and less invidious supposition) suppose but, on the part of the public, a degree (though it be no more than the ordinary degree) of *suspicion* of a deficiency of trustworthiness in any of these points on the part of the judge; the advantage capable of being possessed by the information when in the shape of *reported* evidence, may be not inconsiderable. The judge (supposing him to repair to the spot alone) sees as much of the evidence as he pleases, and no more than he pleases: pays what attention to it he pleases, and no more than he pleases: contemplates it, if he pleases, on one side only, and with no other intention than that of discovering what pretences can be found, what excuses can be made to the public and his own conscience, for deducing from it inferences favourable to that side of the cause which his affections induce him to espouse. With these eyes it is that he views it: and it is after thus viewing it, in his character of a witness, that he reports it—to

whom?—to himself, in the character of a judge. It is the judge himself who is the witness; and that witness examined *in secreto judicis*, in the recesses of the judge's own conscience; examined, and without cross-examination, by the judge.

Turn now to the opposite case, and see upon what footing stands the case of information from the same source, when reported to the judge through the medium of some other official (or at any rate a preappointed) witness. His report is delivered,—it may at least be, and therefore (at the instance of either party) ought to be, delivered,—upon the same footing, in every respect, as that of any ordinary witness; in public, and subject to cross-examination, with the several attendant securities. It is from this completely scrutinized evidence, delivered under the eye of the public, that the judge, himself speaking and acting under the eye of the public, draws his inferences.

In the one case, the judge decides upon data not before the public, and the public in consequence has no control over him: in the other case, the judge decides, as in ordinary cases, from data which are as completely before the public as before himself.

With respect to the option, the question therefore seems to be brought to this point:—In the case where the information presents itself to the judge in the shape of immediate real evidence, (the judge conveying himself to the spot for the purpose of contemplating it in that shape), can he, or can he not, take the public, a sufficient portion of the public, with him? If he can, and does, in such case the immediate evidence

preserves its superiority over transmitted evidence. If he does not; in that case, the transmitted evidence, instead of being inferior, is in fact, in a practical view, superior, to the immediate evidence: the transmitted evidence (though in itself it possesses the characteristic property of makeshift and irregular evidence) to the regular.*

* The justice that is of immediate and intrinsic importance, the justice upon which the sense of security on the part of the public depends, is not abstract real justice, but apparent justice. Real justice is no otherwise of importance, than in as far as apparent justice (as is the case in the ordinary state of things) depends upon it. The supposition is a strained and odious one; nor is it without great exertion and reluctance, that the mind of man, especially the mind of an ardent lover of justice, can bring itself to frame it: but, for the moment, and in the character of a supposition, it may be an instructive one. Better by far that injustice should be really done in all cases, so justice be universally thought to be done in the same cases, than that justice should be done in all cases, at the same time that in half, or though it were but a quarter, or say a tenth, or even a twentieth part of those cases (we know not where to draw the line), injustice, and not justice, were with equal universality thought to be done. In the former case, in respect of the mischief of the *second order* (see Dumont, and Introduction), no alarm, no sense of insecurity, by the supposition: in the other case, a violent alarm; a strong sense of insecurity, and that a universal one.

But, in the case where the information is presented to the judge in the shape of immediate real evidence, the public not present; the sort of justice in favour of which the chance is augmented, is no more than real abstract justice, as above described: the justice in favour of which the chance is lessened, is apparent justice. In the case where the public is present, — whether it be in the shape of immediate real evidence, or reported real evidence, that the information is presented, — the probability in favour of apparent justice is at any rate preserved undiminished, howsoever, in the case of reported evidence, the matter may stand in respect of real abstract justice.

CHAPTER X.

OF EVIDENCE TRANSMITTED THROUGH AN
INDEFINITE NUMBER OF MEDIA.

WE come now to the case where the information in question presents itself as if transmitted through media, simple or complex, as above described, and in each case with repetitions, in any number, of any one or more of the elements.

The modifications of which this case is susceptible, are evidently infinite. Happily, the conduct that seems proper to be observed in relation to them will be found capable of being determined by a few simple principles.

The first point to be ascertained under this head, is the influence exercised by the number of the media upon the probative force of the information thus conveyed.

For this purpose, instead of the word *medium*, there may on some occasions be a convenience in employing the word *degree*.

The mode in which this is to be done, is by reckoning, for every medium through which the evidence passes, a degree. Thus, hearsay evi-

dence through one medium is of the first degree, through two media of the second degree, and so on.

1. In every succession from one medium to another, by which a supposed extrajudicial statement passes, in its way from the supposed percipient or other primary extrajudicial narrator, to the ear or eye of the judge,—it loses a portion of its probative force.

2. This it does of course from the mere consideration of the general chance of incorrectness; and without taking into the account any peculiar chance of incorrectness capable of being produced by the idiosyncratic character of any of the supposed intervening relators.

3. The circumstance of mendacity or bias affords likewise at every step an additional chance or probability of incorrectness, as well as of falsehood *in toto*: but this chance, depending upon idiosyncratic character and circumstances, is incapable of being estimated, any further than as the situation and character of individuals is taken into the account, and made the subject of special investigation.

4. Conceive divers supposed extrajudicial witnesses of the same remove or degree, each represented as confirming, in tenor or in purport, the supposed statement supposed to have been given by the rest:—for each such witness, (credit given to the fact of their having existed in that character), the evidence acquires a portion of probative force.

5. But the greatest additional portion of probative force capable of being thus acquired, can never be great enough to raise the probative force of a lot of hearsay evidence standing at

that degree, to a level with one standing at a higher degree, *i. e.* in which the number of media it is supposed to have passed through is less.

6. Deponens (for example) states, that, on a certain occasion, a number of persons, whom he names, (John Middleman, Thomas Middleman, and others), concurred in assuring him that they were present when Percipiens was giving an account of a duel fought in his presence between the defendant and Occisus, in the course of which Occisus received his death wound. It is evident that, so far as Deponens is believed, the fact of defendant's having been the cause of the death of Occisus will acquire an additional, and (setting aside idiosyncrasy) a determinate, portion of probability, for every additional person, of which this number is stated as consisting. But, if there were a thousand such supposed intermediate and mutually confirmative extrajudicial relators, this could never impart to the hearsay evidence of Deponens any such degree of probative force, as if Deponens, instead of representing himself as having taken his information through these thousand media all at the same degree, were to represent himself as having himself taken it immediately from the lips of Percipiens.

Recapitulation. 1. In the case of transmitted evidence, the probative force of the information presented immediately to the judge, is inversely as the number of degrees. 2. Supposing, at each degree, one witness, and no more; at each degree, it is therefore inversely as the number of media or witnesses. 3. But, at any given degree, it is directly as the number of witnesses standing at that same degree,

and supposed to have agreed with one another in their respective extrajudicial statements in relation to the same fact.*

Hence it appears how inconsiderate and inadequate the provision is, of those laws, which, without entering into any such explanations as above, take upon them to obviate misdecision, by requiring, as a necessary ground to the validity of the decision, a specified number of witnesses. The number may be completed, and the probative force of the evidence may in fact, instead of greater, be but so much less, than if there were but one.

On the part of the judge, common honesty, enlightened by common sense, would (it may be thought) be sufficient to supply any such deficiencies on the part of the legislator, and thence to prevent misdecision on this ground. But the instances in which the light of common sense has been extinguished by the vapours of jurisprudential science, are, as it will be seen throughout, but too abundant: and to obviate

* The above remarks apply not only to the case of hearsay evidence through many media, but also to that of transcriptions of evidence through many media, or transcripts of transcripts. One remark still remains, which is peculiar to the latter species.

By confrontation with, and examination by, a transcript of any superior degree, a transcript of any inferior degree may be raised in the scale of trustworthiness to a degree next below that with which it is so compared.

Thus, suppose a transcript of the tenth degree. By examination with the original, it may be endowed with every security for trustworthiness that can be given to a transcript of the first degree, and is thereby raised altogether upon a level with a transcript of that first degree: by confrontation with a transcript of the first degree, it may in the same way be endowed with every security for trustworthiness that can be given to a transcript of the second degree.

in that quarter some apprehended deficiency in the article of common honesty, is the undisguised object of the legislator in the framing of such restrictive and exclusive regulations.*

Transmitted evidence purporting to have passed through more media than one, may still be received, whatsoever be the number of such media: to wit, in every case in which make-shift evidence transmitted through no more than one medium would be received; always under the same conditions and restrictions. So likewise in the case where the individual description, or even the number of the media, cannot be ascertained.

To a mind impregnated with the principle of the excluding system, a proposition to this effect cannot but appear in the highest degree alarming. What? let in upon the mind of the judge a deluge of evidence, to the untrustworthiness of which there is no bounds?

Reasons in support of the rule, — arguments *à priori*, supported, and well supported, by arguments *à posteriori*, — are, however, by no means wanting: reasons, and such (it is believed) as will be found satisfactory upon the whole.

1. The main and most striking reason is, that, by the alleged increase in the number of the media, no new facility is given to fraud. On the contrary, it can never answer the purposes of fraud, it would be unfavourable to the pur-

* Will it be said, that, when two witnesses are thus made necessary, they must both of them, of course, be deposing witnesses? If any such position were advanced, it would be rejected at any rate by English law. In the case of treason, to ground conviction, there must, indeed, by statute, be two witnesses; but, by jurisprudence, one at least of these two witnesses may be a piece of paper.

poses of fraud, falsely, or even truly, to represent any such increase. That assurance of correctness cannot but be diminished in proportion to the number of media the evidence has passed through, is a truth, the force of which cannot but be felt by every mind to which it is presented. But a man actuated by fraud, intending deception, to be brought about by mendacity, will of course give to the information the most plausible, the most trustworthy, form, of which it is susceptible: he will never spontaneously and unnecessarily multiply causes of untrustworthiness and distrust in regard to it.

A man says what is not only sooner said, but more likely to be believed, and yet not more likely to be detected if false, if he says, I had the fact from Titius, who said he saw it, but is now dead, than if he says, I had the fact from Titius, who is dead, and who says he had it from Sempronius, who, if Titius is to be believed, gave Titius to understand that he saw it, but being dead also, cannot be called upon for his testimony.

Take, for example, a case from English jurisprudence.* The validity of a will being in question, a will purporting to have been executed in the presence of three witnesses, whose names were entered upon the face of it in the character of attesting witnesses; two of these supposed witnesses were proved to be dead: the third, on her cross-examination, deposed, that, on her attending one of the other

* *Clymer v. Kettler*, Hawk. iv. 428, from 3 Burrows, 1245.

two in his last illness, about three weeks before his death, he pulled the will from his bosom, and acknowledged to her that it was forged by himself. This evidence (it appears) was received, was credited, and the decision, a decision pronouncing the will a spurious one, grounded upon it. This supposed oral evidence transmitted through oral, this evidence, hearsay evidence as it was, was received and credited. It was regarded as not only veracious, but true; by the proper judges, judging from the whole complexion of the evidence on both sides.

Now to the point in question. Suppose that, instead of being deemed true, it had been deemed false and mendacious, and had been so accordingly. The will was, on this supposition, a genuine one: the story of its having been declared by one of the attesting witnesses to be spurious (spurious as having been forged by himself), was a mendacious story, trumped up by this witness, who, it being false, could not but have been conscious of its being so. Now then, suppose that, instead of saying that what she heard as above, she heard from the supposed forger himself, she had spoken of it as having been heard from John Middleman, now also dead, who said he heard it from the supposed forger, under the same circumstances as above: would the fraud in this shape have presented any more plausible title to credence than in the other? The answer, it should seem, will hardly be in the affirmative.

2. The danger of fraud (*i. e.* of deception by fraud) not being increased by the number of supposed media; there remains the danger of incorrectness, *i. e.* of deception by incorrectness.

But in this case, in whatsoever proportion the danger of incorrectness may be thus increased, the danger of deception does not increase with it : for, whatsoever be the danger of incorrectness, it is apparent to every eye, upon the very face of the evidence : apparent to all eyes alike, and in no danger at all of being set down at any value below its real value.

In regard to fraud, a possible observation on the other side is this. Information being, according to your observation, more likely to be incorrect when transmitted through several media, than if transmitted through no more than one, and so in that light likely to appear to every body ; a man who, meaning fraud, were to represent the information as having passed through more media than one, might by that device exempt his testimony from the imputation of fraud, and by that means gain for his false testimony, in this complex shape, a degree of credence beyond what could be gained for it by its being presented in the more simple shape. The propriety of this observation might perhaps be admitted : but at any rate it does not seem worth controverting on one side, or worth relying upon on the other side. For a lot of evidence to gain credence, it is not sufficient that it appear exempt from fraud ; it must appear correct and true : it is not sufficient that it be regarded as being pure from material error from this or that *particular* source ; it must be regarded as pure from material error from *whatever* source. But the fresh degree of untrustworthiness it is necessarily tinged with by every medium through which it passes, is essential to its very nature : and it is only in part,

and not in the whole, that it can be done away by any marks of comparative purity in no more than one out of whatever may be the number of the media through which it is supposed to flow.

Add to which (if it be worth adding), that this supposed receipt for putting a varnish of veracity upon mendacious evidence, is on no other supposition a promising one, than that of its remaining a secret: a secret in mendacious hands. But, the secret being now published, (not to say that it is of itself sufficiently obvious), the virtue of it, if it ever possessed any, or would have been capable of possessing any, is already at an end: the eventual offspring of fraud has been torn from her womb and been rendered abortive.

The truth of the above conclusions will be found to receive ample confirmation from general, and (it may be added) even necessary, practice.

Turn to any established system of judicature, an extensive class of cases may be found, (and that the same, or nearly the same, in all), in which transmitted evidence is received without scruple: whatsoever may be the number of media through which it purports to have been transmitted; or even although the very number, as well as the individuality, of such media, be undiscoverable. The class of cases in question is that in which the principal fact in question, the principal fact to be proved or disproved, belongs to the class of what may be called *ancient facts*: a fact which, supposing it to have happened, happened so long ago, that it would be in vain to look to any witnesses, forthcoming, and consequently still living, from whose ex-

amination it might be proved in the regular and most trustworthy mode. But there is nothing in the mere *date* of a fact, and that *relative*, measured from a particular point of time (the time in which the proof of it comes to be called for), that is capable of rendering it credible upon weaker evidence than would be requisite to gain equal credence for it at another time. That a man of such or such a name, living at such a place, should at that place have been married to a woman of such a name, and had by her children of such and such names, is not a whit more credible if placed at the end of the seventeenth century, than if placed at the end of the eighteenth.

But (except in so far as the application of preappointed evidence may have happened to have extended itself to the instances in question), in former ages, there are no sort of facts that are capable of being established by any other than this weak and long-spun sort of evidence: and yet, for the purposes of legal decision, facts of various descriptions, facts, though placed at ever such remote periods, are, under every system of established law, continually adduced and credited.

Nor can it be said that, if such evidence be at all admissible, no causes except what are of light moment can with propriety be rested upon such slight evidence. In the case where the fact in question belongs to the class of ancient facts, none of those questions of which the great mass of questions of light moment is composed,—small debts, slight assaults, and verbal injuries,—can ever come upon the carpet. Questions of the greatest moment,—

questions relative to the title to estates, to immoveables to any amount, to hereditary powers and honours,—of this sort are the questions that come to be tried upon the ground of this slight evidence.*

* The application of evidence to facts of the religious class not coming within the design of the present work, what follows in this note is mentioned in no other character than that of an *argumentum ad hominem*: but, in that character, applied to all Christian (not to speak of Mahometan and Hindoo) judges, and in particular to English ones, the weight with which it presses seems to be irresistible. Disbelieve transmitted evidence, on the ground of the multitude or the uncertainty of the number of the media through which it purports to have passed, you reject history in general, and all ecclesiastical history in particular. If the facts in support of which evidence of this complexion will naturally be adduced, be, merely on the ground of their having this and no other sort of evidence for their support, to be pronounced incredible, much more must all facts brought to view in the character of a basis of religious opinion be incredible. The supposed facts brought to view for a judicial purpose, are all of them of the most ordinary and natural cast: and whatever chance they may have of gaining credence depends upon the vulgarity of their complexion, their conformity in every respect to what is generally understood to be the ordinary course of nature; *e. g.* that John and Joan, being married at the usual time of life, had sons and daughters, and having attained a usual age, and being possessed of landed property, left such or such a son, or such and such daughters, to succeed to it. The facts which are the subjects of the earliest period of every ecclesiastical history, are facts more or less deviating from what at present is generally understood to be the ordinary course of nature, or they could not be, what by the supposition they are, facts constituting the subjects of religious faith: that Jared, for example, at the age of 162 years, cohabiting with a woman unknown, begat for his first-born a son named Enoch, and died 800 years afterwards, continuing for an unspecified part of that time to beget sons and daughters.†

† Genesis, v. 18, 19, 20.

Truths of the mathematical class, truths in any number, might be heaped together in this field : but in every instance, if attempted to be employed in practice, they would be found either altogether inapplicable, or, if applied, more likely to lead to misdecision than to justice.

The facts which, in the case of the Christian religion, constitute the subject matter and basis of religious faith, do not purport to have been established by any judicial examination, or consigned, in any instance, to an official register, in the character of *preappointed* evidence. The shape in which they present themselves is uniformly that of transcriptural evidence, which, after having passed through an uncertain number of oral media, fixes itself, at a point of time more or less remote from the fact, in the shape of a written original, of the nature of casually-written evidence. If, on this ground, the trustworthiness of an article of transmitted evidence depended, in any such considerable degree, on its proximity to the source, the extraordinary facts which in the Mahometan religion constitute the subject matter of religious faith, would present, in this respect, a better title to credence than the extraordinary facts which in the Christian religion constitute the subject matter of religious faith. For the Koran purports to have had for its author (whether in the character of dictator or of actual scribe makes little difference) Mahomet himself; by whom, or in whose presence, the extraordinary phenomena in question are stated to have been produced : whereas the New Testament, having, for divers portions of it, divers authors, purports not to have had for the author of any portion of it the founder of the religion preached in it, — the person by whose power any of those extraordinary facts were produced ; nor yet (in the instance of any portion of it) any person in whose presence they are stated to have been produced.

The purpose in view in these observations will, I hope, not be misconceived : it is, not the destroying the credit of history in general, or Christian history in particular, but the destroying any objection that, on the ground of English judicial practice, might be opposed to the general rule recommending the leaving the door open to transmitted evidence in general, howsoever multitudinous and uncertain the number of the media through which it may have been transmitted.

Suppose, for example, that a mathematician, taking up the observations brought to view above, were to set to work in his own way, and, because demonstration is the fruit of his own science, fancy he had given *certainty* to the conclusions capable of being formed in relation to the trustworthiness of evidence. *In a series of remotely-transmitted hearsay evidence, every article standing at a degree indicated by a higher number, is lower in the scale of trustworthiness than an article standing at a degree indicated by a lower number.* Expressed, as of course it would be, in mathematical short-hand, by single letters instead of words or combinations of letters, a proposition to the above effect might put in a specious claim to the character of irrefragable truth. Yes: but in what way? On the supposition of a matter of fact, not announced, but gratuitously assumed, and, in a mathematical sense, altogether incapable of being proved: viz. that, in each instance,—an article of hearsay evidence at a lower degree being compared with an article of ditto at a higher degree,—in each medium or rank of mediums, the idiosyncratic trustworthiness of the intermediate witness or witnesses were on the same level. Suppose a suit, having for its subject matter a pecuniary object of inconsiderable value: suppose on both sides a lot of hearsay evidence; on the side of the plaintiff, evidence of the second degree, the deposing witness and the supposed intermediate witness both of them universally known, and known as of the highest rank, as well in the scale of moral reputation as in that of opulence; on the side of the defendant, hearsay evidence only of the first degree, but the reporting witness, the

judicial witness, a pauper notorious for mendacity. By the mathematician, the superior weight of evidence would be demonstrated to be on the side of the defendant; while, by every body but the mathematician, it would be regarded, and, though without demonstration, yet with more reason, as being on the side of the plaintiff.

Add to this, that, in many instances, in which, not without good cause, hearsay evidence of many removes from the supposed source has been employed, (for example, in English practice), not only the persons of the supposed intermediate witnesses, but even the number of the degrees, has not been ascertained, nor been capable of being ascertained. The general sense, conception, understanding, of the neighbourhood. In the case of a testimony to this effect, supposing the conception just, there must in every instance have been a matter of fact at bottom, some determinate matter of fact, the conception of which must, through the respective relations of a certain number of intermediate witnesses, singly or in ranks, have been transmitted to the ears of the deposing witnesses.

In a case of that description, the number of degrees not being ascertained, the requisite data not being given, matter for the hand of the mathematician would not be to be found. Truth, however, would be but the better served by the deficiency: for, the mathematician, with his scientific mode of deceit, not being capable of being set to work, no deception could flow from that source.

CHAPTER XI.

WHAT OUGHT, AND WHAT OUGHT NOT, TO BE DONE, TO OBVIATE THE DANGER OF MISDECISION ON THE GROUND OF MAKESHIFT EVIDENCE.

SECT. I.—*Impropriety of excluding any kind of makeshift evidence.*

It has been seen how various in specie, and how abundant probably in number, are the instances in which makeshift evidence of one description or another, is habitually received, and must ever be received, in judicature.

It has been seen, that a danger of deception, and consequent misdecision, is, in every instance, naturally attached to the reception of makeshift evidence.

It has been seen, on the other hand, how,—by the influence of a principle common to human nature, and in particular to men in the situation occupied by men of law,—the danger of deception has been generally exaggerated: or, what comes to the same thing, such arrangements have been produced as could not be justified on any other supposition than that of a degree of danger beyond the danger really existing in each case:

That this exaggerated estimate has had for its cause an assumption, which, upon a closer examination, turns out to be decidedly erroneous; viz. that the danger of deception on one part is as the danger of falsity on the other:

That the erroneousness of this assumption is proved by every instance in which the prevalence of it is exemplified in practice: for the exemplification of it in practice consists in the determination formed and executed in each instance, the determination *not* to pay any regard *whatever* to the lot of suspected evidence; to consider the falsehood of it as certain, instead of being more or less probable; in a word, to regard it as certain that in each instance the disposition of the judge is to overvalue it: whereas the truth is, that, by every instance in which an exclusion is thus put upon a lot of evidence, a fresh proof is given that the disposition of men in judicial situations is to undervalue it; to treat as if it were incapable of having any weight at all, that which is never altogether without weight, in any instance:

That, under the most natural and extensively prevalent constitution of the judicial establishment, in which the tribunal is composed of one or more permanent and official judges, nothing can be more extravagant or inconsistent than the distrust of which the practice of exclusion is the practical result; whether the object of the distrust be the judge himself by whom the exclusion is pronounced, or his colleagues and successors.

So prone am I to give too much credence to

evidence of this description, that I give it no credence at all ; that I determine to disregard it altogether. So prone am I to decide on insufficient evidence on the one side, that I decide without evidence, and against evidence, in favour of the opposite side.

So prone are all my colleagues, so prone will all my successors be, to give too much credence to such untrustworthy evidence, that I, who alone am proof against such delusions,—I, in order to preserve them against the influence of it, am determined for their sake to pronounce a decision, which, in the character of a precedent, shall tie up their hands, and prevent them from throwing open the door to any such delusive evidence. I, who cannot trust myself with the faculty of pronouncing from the evidence,—I, confident in that exclusive portion of sagacity in which I have none to share with me, have determined by this means (such is my prudence) to impose on my colleagues and successors, to the end of time, the obligation of deciding, in every such case, without and in despite of evidence.

The only instance in which this system of exclusion has any colour of rationality, is that in which (as in one of the many forms of English judicature) the tribunal is composed of a set of ephemeral, unofficial, unprofessional, unexperienced judges, placed under the tutelage, and in some respects under the control, of one or more permanent, official, experienced judges. The jury, were they to be trusted with such evidence, would to a certainty be deceived with it ; therefore they never shall be trusted with it.

Supposing the conception of unfitness on the part of the professional judge to be trusted with such evidence—supposing this conception just, in its application to himself and his experienced brethren; the extension of the same imputation to this unexperienced class of judges, seems, at any rate, clear of the charge of inconsistency: the absurdity is gross and palpable; but it is all of a piece.

On the other hand, suppose the professional sort of judge to be proof against the influence of this species of delusion; suppose the danger of being deceived by it not universally extensive, but confined to the non-professional class of judges; the system of exclusion, even in this limited application of it, is still precipitate and indefensible. You conclude they will be deceived by it: why so hasty in your conclusions? To know whether they have or have not been deceived by it, depends altogether upon yourself. What? can you not so much as stay to hear their verdict? Condemn men unheard? Condemn thus your fellow judges? Apply, where as yet there is no disease, a remedy, and a remedy worse than the disease?—a remedy worse than the disease, when, had you but patience to wait for the disease, a remedy is in your hands as safe and gentle as it is infallible?

Day after day, you annul the verdict of a jury without disguise, and send the cause to be tried by another jury, on the alleged ground of its being a verdict against evidence. Would it cost you any thing to extend the allegation to cases of this description? or to add to the cases calling for a new trial, that of a verdict

grounded on untrustworthy and deceptitious evidence?

Thus much for supposition and argument. In fact, however, no such distinction has had place: the manacles once constructed, unexperienced and experienced hands are alike confined by them. Peers have been not less ready, not to say eager, to impose it upon themselves, than yeomen and shopkeepers to submit to it. It is by such easy means, and at so cheap a price, that favour, when agreeable and convenient, is seated upon the throne of justice.

Nor is the application of the system of exclusion by any means confined to English judicature. Under the auspices of Roman jurisprudence, it is perhaps, upon the whole, still more extensive. What difference there is, seems to be to the advantage of the English system. On the ground of personal untrustworthiness at least, the causes of exclusion are, on the one hand, still more abundantly extensive than in the English system; on the other hand, the adherence to them seems to be much less steady. The range of cases that afford to the judge the faculty of putting an exclusion upon the witness, is still more extensive: but in each instance it is rather a power than an obligation. Is it his pleasure to put an exclusion upon a witness? He may find a warrant for it. Is it his pleasure not to exclude the witness? He may likewise, and equally, find a warrant for it. In the English system, the cases in which, by the advantage of the conflict between preceding decisions, judges have been at liberty to decide either way, are

but too abundant ; but, on the other hand, in the cases to which the conflict has not extended, the option and the license fails : where the decision that stands nearest to the individual case in question is not opposed by any other, usage will not permit its being disregarded.

Adopt the principle of exclusion, in the character of a security against deception,—adopt it in any case whatsoever, there is not any point at which its application can with any consistency be made to cease. Exclude for this reason any one lot of evidence whatsoever, by the same reason you are alike bound to exclude all evidence, and along with it all justice.

Discard the principle of exclusion altogether, (that is, in all cases where the exclusion of the lot of evidence in question would have the effect of excluding all evidence from that source, from the source from which the information issues),—adopt in its stead the principle of universal admissibility,—you do no more than give extension to a principle, the innoxiousness of which, in every point to which the application of it has been extended, has been made manifest by undeviating experience. Among the cases to which it remains to be extended, there cannot be any in which the evidence can be so weak, but that cases in which, being equally weak, it is admitted notwithstanding, abound, and have ever abounded, and without objection or complaint, to an extent, the magnitude of which affords a conclusive proof of the safety with which this sort of liberty may be allowed.

The cases in which weak evidence is ad-

mitted, weak to every imaginable degree of weakness, are cases in which whatever danger may be attached to the admission is altogether out of the reach of remedy:—1. Weak circumstantial evidence: evidence, in the case of which, the connexion between the principal fact and the supposed evidentiary fact is loose and remote to any degree of remoteness. 2. Weak direct evidence; in the case where the veracity or correctness of the testimony is endangered by some cause of illusion, or by some sinister interest, which either *in specie* is not taken into the account, or, in the individual instance, is out of the reach of observation.

The inconveniences attached to the observance of the principle of exclusion are altogether out of the reach of all remedy, palliative as well as curative. The dangers attached to the principle of universal admissibility are not only in themselves inferior, in a prodigious degree, to the mischiefs attached to the principle of exclusion; but, whatsoever they may amount to, at the worst, arrangements are not wanting by which (in one way or other) defalcations may be made, reductions may be applied, and at any rate certain limits may be set, to the mischief; that is, to the number of the instances of misdecision capable of flowing from this source.

These arrangements, such as the nature of the subject has suggested, remain to be brought to view in this place.

SECT. II.—*Arrangements for indicating the amount of the danger.*

ARRANGEMENTS having for their object to

lessen the danger of misdecision from the admission of makeshift and other weak evidence, may be distinguished, in the first place, into such as have for their more immediate object the *making known* the actual amount of the danger, and such as have for their more immediate object the *lessening* the amount of it.

Arrangements having for their immediate object the lessening the amount of it, may combat it in either of two ways: by lessening the frequency of it, or by lessening the amount of it when it happens.

Provisions having for their result the bringing to view, in the shape of experience, the utmost possible amount of the mischief from this source, that is, the *limits* of that amount, would, in a variety of ways, be of unquestionable use.

1. They will constitute a sure, and the only sure, basis of legislation, in this as in so many other cases: facts, shewing, by the light of experience, the effects of existing institutions.

2. They will form a natural, proper, and most satisfactory accompaniment of any such arrangements as might be thought fit to be made, on this part of the ground of evidence, tending to do away, or narrow, the application of the excluding system.

3. They will form, in the first instance, a visible security against any durable and considerable inconvenience, considered as derivable from any such defalcation from the authority of the excluding system. Should deception, and consequent misdecision, be suspected, justly or unjustly, of running in any increased stream, from any branch of the newly-opened and apprehended source,—measures may thereupon be

taken for remedying the mischief, at any time, and at its earliest stage. They will also serve as an anodyne to any panic terrors that might otherwise be produced by the contemplation of an innovation, which to some eyes may be apt, in spite of the clearest deductions of reason and even experience, to appear a formidable one.

4. On the supposition of the adoption of the other proposed remedial arrangements; they will serve to give a correct view, the only tolerably correct view that can be given, of the degree in which those arrangements prove conducive to their intended purpose.

If the different modifications of makeshift evidence, and the other sorts of evidence particularly liable to prove weak, and, by their weakness, deceptitious, have been here delineated and explained with sufficient clearness; a judge, and the scribes his subordinates, will find no difficulty in committing to paper, as often as a lot of evidence appertaining to any of these heads presents itself, the head to which it appertains. In such or such a cause (naming it), on the side of the plaintiff, the evidence was of this or that description (naming it), and no other; on the side of the defendant, there was no evidence, or evidence of this or that description (naming it): the decision was in favour of the plaintiff, or *vice versa*.

Referring a lot of evidence to the species to which it appeared to belong, in a system of nomenclature thus constructed, would be a sort of exercise analogous to that scholastic exercise, which, in the language of grammatical instruction, is called *parsing*; referring each word to that one of the *genera generalissima* of

grammar, the eight or nine *parts of speech*, to which it appears to belong.

If the principle thus brought to view, the principle of methodical registration, were applied to every suit without exception, whether turning or not turning upon any suspicious species of evidence: the sort of register thus produced would, in more ways than one, be conducive, in no inconsiderable degree, to the ends of justice: as has been shewn in treating of pre-appointed evidence.

From a register of this kind, the utmost possible amount of the mischief produced by the admission of evidence of a suspicious complexion, as thus distinguished,—produced by the aggregate of suspicious evidence, of all sorts taken together, and of each sort in particular,—may be indicated, with the utmost degree of exactness that can be desired: and, by comparing year with year, it will be seen whether it be in a stationary state, in a state of increase, or of decrease.

Suppose, for example, that, in a given year, the number of instances in which, on one side, no other evidence was exhibited than what belonged to one or another of the species of makeshift or other suspicious evidence, amounted to 100; and, of this number, in 50 instances the decision went in disfavour of the side on which the suspicious evidence was exhibited; in the 50 other instances, in favour of that side. This last number would represent the utmost possible amount, on one hand, of the mischief (as likewise, on the other hand, of the good) produced by the leaving or throwing open the door to evidence of this sort. Thus

much as to the aggregate of the cases of all sorts put together : and the same instruction would be afforded in relation to each sort taken by itself.

Though the number of the instances in which benefit or mischief has been produced by the admission of evidence of this description, would thus be given ; yet, to exhibit the aggregate quantum of the benefit on the one hand, and of the mischief on the other ; would require another head or two, having for their object the indication of the quantum of benefit or mischief thus produced in each cause. To furnish this information would require a statement of the species of causes to which the individual cause belonged, in each instance ; (for example, penal or non-penal ; and, if penal, relative to what species of offence) : and, in the cases where money or money's worth was at stake, the amount of the value adjudged, or claimed and refused to be adjudged, to either side.

SECT. III.—*Arrangements for diminishing the amount of the danger.*

WE come now to the second class of remedial arrangements applicable to the diminution of the quantum of mischief from this source : arrangements aiming, in a direct way, at the diminution of the frequency of it.

I. *Oath of credence or sincerity* on the part of the exhibitant : (the party by whom the article of makeshift evidence in question is exhibited) : his declaration to this effect, viz. that, according to his persuasion, the information presented by the article of evidence, is, so far as concerns

the purpose for which he presents it, correct and true: such declaration being given under the sanction of an oath (where that ceremony is in use), or solemn declaration, and subject to *viva voce* examination as to the grounds and causes of such persuasion.

The test of sincerity thus proposed is no other than what, on a former occasion, was brought to view in the number of those *securities*, the refusal of which, on any occasion whatsoever, was represented as an omission altogether repugnant to the ends of justice. It nevertheless seemed to call for a separate mention here; partly, lest, on an occasion on which the use of it is so manifest, it should fail of presenting itself to view; partly, because, on the occasion of its application to the present purpose, it finds the case attended with material circumstances, such as do not apply to it in other cases: with circumstances which call for particular observation.

The cases in which the demand for this security is most imperative, are those in which the evidence presented immediately to the judge, presents itself, not in the oral, but in the written form; viz. casually-written evidence, and minuted evidence, with any number of media interposed. In the cases where the evidence presented immediately to the judge is in the oral form, whatever security for sincerity is afforded by judicial examination in the usual manner, is applied, of course, to the judicial witness. Where there is no extraneous witness, this security is wanting; and hence the demand for a supply to the deficiency, by the examination of the party by whom the evi-

dence (in this case the written evidence) is exhibited.

No good reason could be given why this same security (whatever be the worth of it) should not be applied, in like manner, to those modifications of transmitted evidence, in the case of which the evidence immediately presented to the judge is presented in the oral form; viz. hearsay evidence, and *memoriter* evidence. Indeed, unless excluded by special appointment of law, the general liberty of examination, applying itself to self-regarding as well as extraneous evidence, would involve the points in question in the present case. In the way of distinction, all that can be said here is, that, where there is another person (viz. the extraneous witness) to whom the security applies, the demand for the application of the like security to the testimony of the party, in the character of a self-regarding witness, is not quite so great.

In a certain point of view, the security thus afforded may be apt to present itself as little worth. A party, who, having been dishonest enough to procure or fabricate an article of evidence of this sort, is dishonest enough to make use of it, will come prepared for all the consequences; nor will he shrink from perjury, from the scarce punishable perjury necessary to give this support to it. True: but, in regard to the written evidence of this kind, many a man who, either knowing or suspecting the falsity or incorrectness of it, would present it notwithstanding, and thus let it take its chance, would at the same time be far enough from supporting it at the peril of the punishment of

detected, or though it were only the shame of *suspected*, perjury : and, in regard to the oral evidence of this kind, not only would many a man, notwithstanding any secret suspicion entertained by him of its falsity or incorrectness, suffer it, if proffered, to take its chance as before ; but there are also others, who, though not bold enough to support a tale of perjury with their own lips, would yet be dishonest enough to send other lips upon the adventure.

Thus, in two cases, both of them but too common, the arrangements proposed would afford considerable security. At present, under every system of technical procedure, this security is altogether wanting. When judges, on so many occasions as we have seen, not only apply no discouragement to insincerity, but apply encouragement and even compulsion to the production of mendacity ; when judges, by the whole tenor of their practice, proclaim a predilection for insincerity ; can it with any reason be expected that suitors in general, or more particularly that their professional guides and agents, the worshippers of the judicial hierarchy, should in general be averse to it, or, when employable with safety, backward to employ it ?

II. To this head also belongs another arrangement, all along proposed, for allowing to the judge (to be exercised at his discretion) the power of exacting from the party in whose favour the decision operates in the first instance, security for *eventual reinstatement* ; for affording to the other party completely adequate satisfaction, in case, by the subsequent exhibition of more trustworthy evidence from the same original source, the decision having

the makeshift evidence for its ground should turn out to be erroneous.

On those occasions, the description of the contingency was confined to the particular event bearing a special relation to the case then in contemplation: the event of the disproof of the makeshift evidence, by other evidence emanating from the same original source. But, from what source soever any such subsequently corrective evidence may have issued; if it be true, and the decision called for by it be different from that which it finds in force, the practical inference (it is evident) is precisely the same.

III. In what cases, for the remedying of the injustice liable to be produced by the decision of one tribunal, liberty should be granted or obligation imposed of submitting the cause to the cognizance of another, is a question that belongs not to the present subject, nor to the present work.

In the extraordinary sort of case here in question, that of a decision grounded on such weak and comparatively untrustworthy evidence,—such reference might perhaps with propriety be prescribed or allowed of, in causes and circumstances in which, supposing the decision grounded on evidence of the ordinary stamp, such reference might not be eligible. Without attempting at present to decide upon the eligibility of any of these arrangements; the present indication will be confined to such remedies of this stamp as the nature of the case admits of. The question of their ultimate eligibility properly appertains to another subject, that of procedure.

1. Liberty of appeal: *i. e.* of appealing to

another tribunal, whose decision shall have for its ground this same body of evidence, without either addition or defalcation. The person by whom such appeal (if preferred at all) will be preferred, is of course a party; and that party to whose prejudice the decision, having the supposed insufficient evidence for its ground, is regarded by him as having operated.

2. Liberty of reference: power given to the judge to refer the decision, in a case of this sort, to another tribunal (naturally a superior tribunal), if he thinks fit: with or without a provisional decision of his own annexed to it.

An arrangement of this description is superseded (it may be thought) by the one immediately preceding it: if appeal be allowed, the party in whose disfavour the decision (the decision grounded on the comparatively untrustworthy evidence) operates, will, if he considers it as being injurious to him, appeal of course: if he does not regard it as injurious to him, the case calling for a reference does not exist: so that, in each and every case, such reference is of no use.

To this it may be answered,—1. The party, howsoever willing to appeal, may be disabled by the expense. 2. He may be deterred by the contemplation of the expense and vexation added together. 3. He may be deterred by the consideration of the weight and authority of the opinion declared by the court below. The court above, — whether, if it had to frame a decision on the subject in the first instance, it would or would not have pronounced the same as that which has been pronounced below, — may not regard the case as clear enough to

warrant the reversing a decision already pronounced by a competent judicature.

Upon all these considerations taken together, it will probably appear that the demand for the power thus proposed to be given to the judge, would by no means be superseded by the power of appeal, if given to the party.

Moreover, (in case of appeal), argument, and consequently expense or vexation on the part of the appellant, and consequently on the part of the adversary, would be naturally (though, it should be added, not necessarily) allowed: whereas, in case of a reference made (as above) by one tribunal to another, such argument, with the vexation and expense attached to it, would not be so much in course.

3. *Obligation* of reference: *obligation* super-added to the power above proposed to be given to the judge: the reference in this case being or not being accompanied by a provisional decision previously pronounced by himself.

4. In the case of trial by jury,—power to the judge (the professional directing judge) to order a new trial, if dissatisfied with a verdict given on the ground of the suspicious evidence.

This arrangement takes for granted a previous *charge*, or direction from the judge, warning the jury against the error into which the order for a new trial assumes them to have fallen, by deciding in favour of the evidence, the insufficiency of which is thus assumed.

In English law, (it has already been observed), new trial granted, at the instance of a party, on the ground of the verdict's being *against* evidence, is in familiar use: the extension would be a very slight one, were

the power extended to the case of a verdict supposed to be grounded (as above) on *insufficient* evidence.

In the case of exclusion in general, the assumption is, that, if the jury were suffered to hear the evidence, they would be sure to be deceived by it. Experience, had judges but patience to consult her, would have superseded the demand for this rash suspicion. Will they be deceived by it? stay and see. Should their decision prove erroneous, then, and not till then, it may be proper to take measures for obtaining a new one.

SECT. IV. — *Importance of admitting makeshift in the character of indicative evidence.*

THE principle employed for fixing the conditions to be annexed to the admission of makeshift evidence, was this : viz. not to admit any such comparatively untrustworthy evidence, where evidence to the same effect is to be had in a more trustworthy shape, from the same source.

But, supposing the sources of information to exist, will the information be always to be obtained from them in any such more trustworthy shape? He whose interest it is to bring forward the information in question, will it be in his power to draw it forth from those superior sources? This will depend upon the sagacity and industry displayed on this ground by the legislator: upon the care taken by him to afford the requisite *powers*, to him (whosoever he be) whose inclination and will is in a state of preparation for this service.

The powers in question are those which are requisite to the investigation of a chain or thread of evidence: to the *discovery* of such evidence as the individual nature of the case may have happened to afford; and (when discovered) to the securing of its *forthcomingness* for the purposes of justice.

To take the arrangements adapted to this purpose, constitutes one of the principal functions of the system of *procedure*: to that subject accordingly they belong, and not to the subject of the present work. A brief intimation of the mode in which evidence, fit or unfit to constitute a ground for definitive decision, may be applied to this incidental purpose, may, not without reason, be expected to be found here.

By the term *indicative* evidence, I understand, not any particular and separate sort of evidence, such as circumstantial, direct, self-regarding, and so forth, — but evidence of any sort, considered as being productive of a particular effect, viz. the indicating or bringing to view the existence, certain or probable, of some other article of evidence. Indicative evidence is *evidence of evidence*.

To apply the distinction to the subject of makeshift evidence. If the rule above laid down in this behalf be a proper one, no article of makeshift evidence ought to be received (viz. into the list of the articles constituting on that side the ground for decision), where evidence in a more trustworthy form is to be had from the same source: in other words, no such article of evidence ought to be received into the budget of documents designed by the judge for *ultimate*

use. Be it so : but neither of this description, nor of any other conceivable description, can any sort or article of evidence be named, which it may not be proper to employ in the character of *indicative* evidence ; viz. as a help to the discovery or procurement of other evidence, such as may be fit for ultimate use.

Thus, for example, in the instance of hearsay evidence : hearsay evidence of the second degree : supposed oral evidence transmitted through two media. Says deposing witness, in his examination before the judge, — Middleman, as he said to me, heard Percipiens say, that he was by, and saw what passed, when the defendant gave Occisus his death's wound : and there ends his evidence. Now then, Middleman and Percipiens, are they both alive ? The evidence is plainly unfit to be received into the budget for ultimate use : accordingly, neither would it in any case be so received into any such collection under English law.

But ought such information to be altogether unemployed and lost ? By no means. Unfit, in the character of evidence, for ultimate use, it is not the less fit for serving in the character of indicative evidence. Let Percipiens be convened before the judge : and if, on being examined, he gives evasive answers, or says he knows nothing about the matter, let Middleman be convened to confront him ; that, by means of Middleman's testimony, the misrecollections (if any) in the evidence of Percipiens, may, if possible, be corrected, — the deficiencies in his recollection may, if possible, be supplied.

The same explanations are alike applicable to every other modification of makeshift evi-

dence. Casually-written evidence is indicative, with relation to the judicially-extractible oral evidence of the writer of the script: transcriptional evidence is indicative, with relation to the original script: minuted evidence is so, with relation to the writer of the minute, as well as to any extrajudicial witness whose oral statement or narration is the subject of it: *memoriter* evidence is so, with relation to the script, the supposed tenor, purport, or effect of which, is thus reported: reported real evidence is so, with relation to the real evidence which is the subject of the report: and, in case of the interposition of divers media, transmitted evidence of any degree is indicative, of course, of all superior degrees of evidence from the same original source.

From the bare description of this species of evidence (that is, of the use thus to be made of any species of evidence), it will be manifest beyond dispute that any system, which, for the purpose of any sort of cause, penal or non-penal, should (unless for the avoidance of preponderant delay, vexation, and expense) omit to make use of makeshift or other evidence in this way,—to make use of it to the utmost, for the purpose of discovering and obtaining such information as is to be had in a state fit for ultimate use,—is, to the amount of such omissions, defective, and unconducive to the ends of justice.

The proposition is not a purely hypothetical one. In the instance of the English system of procedure, exemplifications of it but too extensive may be observed. In the penal branch, in cases of felony unclergyable and clergyable,

or (to speak without nonsense) in first and second rate crimes, evidence, applicable or not to ultimate use, becomes by accident applicable to this use: it serves for the discovery, and thence perhaps for the obtainment, of evidence ultimately employable. This incidental use is extendible, always by accident,—for design (design, at least, directed to the legitimate ends of justice) is an incident still wanting to the jurisprudential system of English procedure),—this use is extendible, to a certain degree, to inferior offences. But, to causes non-penal, carried on in any branch of the regular mode, (whether it be the branch called the common law branch, or the branch called the equity branch), it is scarce in any case extendible. If the evidence which the witness whom you have summoned has it in his power to give, happens to be of that sort which is applicable to ultimate use, well and good, it may be put to use accordingly: if not, the arrangements of procedure will not suffer it to be put to the other use: if you have no evidence from any other source, be the evidence obtainable from this source ever so conclusive, you lose your cause.

CHAPTER XII.

ABERRATIONS OF ENGLISH LAW IN REGARD
TO MAKESHIFT EVIDENCE.

SUCH are the arrangements, such the rules of judging, that have been suggested by a regard for the ends of justice : the avoidance of misdecision, on one hand ; and, on the other, the reducing, on every occasion, to their least dimensions, the collateral and never completely avoidable inconveniences of delay, vexation, and expense.

If the above arrangements are well adjusted to such their ends ; and if the arrangements actually pursued by English jurisprudence were also well adjusted to these same ends ; those actually existing arrangements could not, in any point, be very widely distant from the above-proposed ones. So much for the argumentative picture of things. The picture next to be given must be taken from life. If, on this occasion, the reader has prepared his mind to view a system of arrangements suggested by, and *bonâ fide* directed to, the ends of justice, great indeed will be his surprise and disappointment. If, on the other hand, the contrary hypothesis be assumed ; if, on con-

sidering the natural opposition of interest on this ground between the governors and the governed, his assumption should be, that, in the views and wishes of the authors of these arrangements, the difference between right decision and misdecision has been in general a matter of indifference; and that, in so far as was conducive to the profit of the governing profession, not the minimum, but the maximum, of delay, vexation, and expense, has been the object of endeavour; he will find every object consistent with that assumption, every arrangement flowing naturally from that source.

An explanatory hint must in this place be given to the non-professional, and more particularly to the non-English, reader. Observing one copy of the same document rejected, at the same time that another copy of the same instrument is admitted; if, for any thing that appears, both are in existence and producible, it may naturally enough appear to him that the rejection of either, however ill-founded in principle, would be matter of indifference in practice. Reasonable as it is, the supposition would be erroneous and delusive. Under a different system of procedure,—under the system drawn from Roman law, and generally prevalent on the continent of Europe,—it would either be agreeable to, or at least less widely distant from, the truth. But in English procedure, no option thus made, if it be exclusive, is ever a matter of indifference. The document thus excluded is always the document, whatever it be, that happens to have been tendered. The consequence of the exclusion is, not a simple reference to the approved document, without

further delay, vexation, or expense, but an actual loss of the cause to the party whose document is thus rejected. The direct injustice thence resulting, as to the main point in dispute, is not indeed, in this case, in *every* instance, irreparable ; but in many and many an instance it is ; either because, under the existing arrangements, the door is not left open to a fresh demand on the same ground ; or because, in the interval, and before it can receive a decision, either some necessary evidence has perished, or the fund necessary for the aliment of the suit has been exhausted. Be this as it may, and according to the least calamitous result, a fresh trial, *hearing*, or whatever be the name of it, is necessary ; in a word, a fresh suit : in consequence of which, the delay, vexation, and expense, bestowed upon the preceding one, is in a great part (or, as the case may be, in the whole) wasted and thrown away.

Here then, once for all, let this deplorable and but too indisputable truth be borne in mind : that,—howsoever it might be under a natural system, and even in the technical system of any other country,—in the technical system of English jurisprudence there are no innoxious, no completely reparable, nor any thing like completely reparable, mistakes ; and that, whatsoever absurdity is discernible,—fraud, and the spirit of extortion, may or may not have been the cause,—plunder, oppression, and affliction, are infallibly the result.

On this ground, as on every other part of the vast demesne of jurisprudence, whatever is at variance with the ends of justice will be to be

referred, in proportions not always to be distinguished, to the two grand sources of misdecision, improbity and folly. The improbity has for its cause the as yet unremedied, but not irremediable, opposition of interests between this class of governors and the governed. The folly has for its cause, at least for a very principal one of its causes, one of the essential characters of jurisprudential law, — the taking the conceptions and practice of a less experienced and less informed, as a standard for the notions and practice of a more experienced and better informed, age.

I proceed to bring to view the most important of the aberrations from the above rules, exemplified in English law : together with the inconveniences with which they respectively appear pregnant.

1. The first consists in admitting, at the instance of the plaintiff, to the prejudice of the defendant, in the lifetime of the defendant, a letter or memorandum in his hand : the defendant, though alive, being neither compelled nor permitted to stand forth himself in the character of a deposing witness, to be examined upon oath (as a non-litigant witness would be) touching the facts brought to view in such written discourse. And so in the case of a written statement of the plaintiff's, at the instance of the defendant.

By the influence of a superstition, which has been already touched upon, and which will be more thoroughly discussed in another place, the evidence of a defendant is not permitted to be extracted in the mode recognized to be the best. But the objection confines itself to the

best mode : no sooner does a bad mode present itself, than the prohibition is taken off.

Refusing to hear the testimony of a defendant, extracted in the way of *viva voce* examination, the law refuses (as may well be imagined) to receive the testimony of the same person exhibited in the form of written non-judicial evidence ; in the form of a letter or memorandum, not designed at the time of writing it (or at least not purporting to be designed) to be exhibited as evidence. So far, at any rate, it is consistent ; and, admitting the propriety of not suffering the defendant to be examined in the character of a witness, unexceptionable.

But when the plaintiff, having by any accident possessed himself of a letter or memorandum in the handwriting of the defendant, thinks fit on his part to exhibit it as evidence ; then the rule goes for nothing, and the evidence is admitted. In this admission, the law considers itself as safe against deceit : and so it undoubtedly is ; viz. on one side, the side of the plaintiff ; the only side to which, on this occasion, its views appear to have extended. To the prejudice of the plaintiff, the admission of it will not be productive of injustice : why ? because it is he who produces it. So far is right : the reason is a conclusive one. But the defendant ? are his interests taken equal care of ? The answer is, no : they are entirely neglected. In a multitude of cases,—each of them capable of being realized, each of them, doubtless, every now and then realized,—conclusions as contrary to truth, as they are prejudicial to the defendant, will every now and then be drawn : necessarily drawn, when a deaf ear

is turned to those *viva voce* explanations, by which the truth of the case might, in its whole extent, be brought to light.

2. The second aberration consists in the exclusion put upon the like written testimony of a witness, litigant or non-litigant, after his decease : a point of time, after which, on the one hand, the examination of such witness is become impossible ; on the other hand, the capacity of profiting, in his own person at least, by such his testimony, supposing it false and fraudulent, is at an end.

Such (it will be seen) is the course taken in general by the English law : a course crossed indeed by a multitude of exceptions, the propriety of which can by no other arguments be maintained, than by such, the validity of which is the condemnation of the general rule.

In the whole field of evidence, which is as much as to say, in the whole field of justice, few points can be of greater importance. Under this head come the books of a shop-keeper, including the register kept by him of the monies due to him. That these books should not of themselves, and during the master's lifetime, be conclusive evidence in his favour, the evidence unsanctioned, and the author uncross-examined, is a proposition too plain to stand in need of argument. Each shop-keeper might, at that rate, impose a tax to any amount, on any number of persons, at his choice. That the written evidence even of his servant in his behalf should not be received as conclusive, should not be received at all during the lifetime of such servant, such servant being capable of being examined in the regular mode, and yet

not examined, is another proposition which I have endeavoured to establish. But if, after the death of such servant, the entries made by him were not permitted so much as to be received in the character of evidence, what would be the consequence? That every tradesman's title to the monies owing to him for his goods, would be dependent, completely dependent, on the life of the servant, the book-keeper, the journeyman, the porter, by whom they had been respectively delivered to his customers. The death of the servant, and the ruin of the master, would be the effect of the same inevitable cause.

A word, a phrase, a broken hint, an uncompleted and perhaps uncompletable sentence,—such is the garb in which Reason clothes herself on those great and rare occasions, on which she vouchsafes to visit the shelves of English law. Sometimes the word “*necessity*,” sometimes the phrase “*course of trade*,” is the fragment of a reason, under favour of which a pretence is sought for the breach made, upon this ground, in the irrational and intolerable rule. But to what use introduce *necessity*? What justification can *necessity* afford for the breach of any rule laid down by reason, of a rule prescribed by any comprehensive view of the dictates of utility? The species of evidence being admitted, one or other of two opposite results, deception, or non-deception, is the most probable. If admitted, would it be oftener productive of deception, and thence of erroneous decision, than of a just persuasion, and thence of a decision according to truth and justice? In this case, where is the *necessity*

(let what will be understood as signified by that vague appellation) — where or what is the *necessity*, that can warrant the admission of the fallacious light?

Apply the same observation to the compound term, the *course of trade*. Trade is a good thing: it is universally agreed to be so: great sacrifices, though not always very advantageous ones, are made continually in its service. But is it in the nature of trade, any more than of any other desirable object, to be benefited or promoted by the letting in a species of light, of which injustice oftener than justice will by the supposition be the consequence? Is it in the nature of trade, any more than of justice, to receive advancement by a system of decision, of which the effect will be, to put the fruits and profits of trade more frequently into the pocket of a cheat than of the lawful owner?

Of two things, one. The evidence admitted either promises to be most frequently productive of justice, or of injustice. If of justice, no such word as necessity or trade can be *necessary*; if of injustice, no such word can be *sufficient*, to warrant the admission of it.*

It has been observed already, that there is a whole class of facts, for the proof of which, in spite of all excluding rules, a door is thrown wide open to all sorts of evidence without scruple: not only to this but too suspicious evidence, but to the much more suspicious and fallacious evidence, which, by English lawyers,

* For a fuller exposure of the arguments founded upon the words necessity and trade, see Book IX. EXCLUSION, Part III. DECEPTION, Chap. iii. sect. 3.

has so often been confounded with it; I mean *hearsay* evidence. And what are these facts? I can think of but one attribute by which, indeterminate as it is, they can be designated; and that is, *ancient*: *ancient* facts; facts tending to the establishment of family relation, locally obligatory custom, ancient possession of rights of partial ownership, and the like. If, on one part of the ground more than another, the argument from necessity can be said to apply with peculiar force, it will be on this. On this sort of ground, exclude this sort of evidence, you exclude all evidence. The witch of Endor, the sibyl once so complaisant to the curiosity of Ulysses, are not now in office. Ghosts cannot now be brought into court, *obtorto collo*, to be sworn and cross-examined. An interval of a certain length, has it elapsed between the present time and the time of the fact or supposed fact?—such evidence as the nature of things furnishes, you must admit, or none. Written extrajudicial evidence, if it be to be had, however it happens to present itself, it is your best chance: failing this, even hearsay evidence: hearsay evidence, remote from the fountain head by any number of degrees; and with or without being able to trace it to the fountain head, or so much as to number the degrees. Such is the choice, in respect of sorts of evidence: one of these two, or none. But, even in this case, of what avail, or even import, is the plea of necessity, any more than in any other? As to the import, here indeed it is plain enough that such is the case, this evidence or none. But, in this case, as in every other, is not the absence of all evidence a preferable result to

the presence of a species of evidence, which, be the case what it will, is more likely to give birth to a wrong judgment than to a right one?

In vain would it be to say, that in this case the danger of deception is in any respect less than in any other; on the contrary, it is even greater. Recent testimony, testimony concerning recent facts, if mendacious or otherwise incorrect, possesses its chance of receiving confutation or correction in the regular and most satisfactory mode, from the sanctioned and scrutinized testimony of persons still alive: circumstantial evidence will, in the character of indicative evidence, afford a clue to this or that lot of *viva voce* evidence; a clue which fraud, with all its cunning, may not have suspected. But, in the case of *ancient* facts, who shall follow out the clue that has been broken by the same hand that cut the thread of life?

It may be thought superfluous, after this, to add any such reflections as the following:— 1. that, in point of distance of time, no determinate line has been so much as attempted to be drawn, nor could easily be drawn, between these ancient facts and facts of more ordinary occurrence; 2. that, among the facts thus treated as ancient facts, are facts that may have been but as of yesterday; 3. that in particular, in a case that has given birth to a decision pronouncing the admission of even hearsay evidence, the length of interval extended not beyond twenty years; 4. that the length by which, in the proposed rule, the place of the line which separates admission from exclusion is proposed to be determined, is the length of human life,—a length which, though in one case

it may be but that of an atom, may in another case be some number of times the above recorded and admitted length of twenty years; and 5. that the true criterion between cases for admission and cases for rejection, is constituted, not by the length of time, considered in itself, but by the existence or non-existence of the faculty of submitting the testimony to the action of the scrutinizing and purifying tests. The witness, in mind as well as body, is he still ready at the call of justice? Admit not his written statement, though it have an antiquity of sixty, of eighty years, to plead for it. Has he taken his departure from the world we live in? Admit the paper, though the ink have scarce yet ceased to wet it. But may it not then be false? false, and fabricated for the purpose? Indubitably it may: though, in our own times at least, such fraud, or any mark of such fraud, committed by a hand so circumstanced, is neither natural nor common. But is the presence of such fraud, in each case, more probable than the absence? And, where present, is the success of it more probable than the failure, after all the warning recommended to be given of it, and which so naturally will be given of it? And are these the only times in which the propensity to fraud has been to be found in the nature of man? Forged deeds, and other fruits of lettered fraud, are they in greater proportion to true and authentic writings in these our times, such as they are, than in the times of monkery and monkish charters?

Such are the questions of minor account, that present themselves as applicable to this particular case. But have they not been already

superseded and rendered superfluous by that broadest and all-comprehensive line of argument, which covers the whole of the ground to which the species of evidence now before us is applicable?

3. A third aberration consists in receiving the testimony of a witness in the unsatisfactory form of casually-written evidence, upon the ground of a mere unforthcomingness on his part at the time; without any inquiry into the cause, whether temporary or perpetual; and without provision for reparation of the wrong, in the event of its being proved false by subsequent *vivâ voce* examination in the regular and proper mode. The admissibility of this evidence, under these circumstances, being established, what would be the consequence? That, where the value at stake was sufficient to pay the expense of the fraud, a man would procure his witness, in the first place, to fabricate a piece of written evidence adapted to the circumstances of the case; in the next place, to keep out of the way till after it had been put to its judicial use, and a decision had been grounded upon it. Or, by procuring the like testimony from a man, whose known intention it was, never to revisit the country in which it was to be fabricated, the expense of purchasing absence might thus be saved.

Not that it follows, by any means, that if, under favour of the rule protested against, the characteristic fraud were even to be frequently attempted, the attempt would be as frequently, or any thing like as frequently, successful. With the warning which it is here proposed should be given of it, and which, without any

such proposal, would naturally be given of it, to the judge of fact by the judge of law, I should not expect to see such evidence frequently productive of a decision on that side, even where the truth of the case was on that same side; much less to see any frequent reason for suspecting that fraud had by this means been rendered triumphant. But where, without incurring any such risk, the purposes of substantial justice might in an equal degree be accomplished, the danger, whatever it may amount to, seems to have nothing to compensate it.

Symptoms of a tendency at least to admit in this unguarded way evidence in its own nature so suspicious, so apt to be fallacious, has been here and there betrayed by English law.

4. In regard to the admission of transcripts, the aberrations of English law are still more remarkable.

In the case where the original is not absolutely unproducible, the question respecting the admission of transcripts will be apt at first to present itself as of little or no practical importance: if the transcript will serve, let it be admitted; if not, let the original be produced. Thus, in effect, the matter will stand, taking the world at large. But in English procedure, the spirit of chicane has, on this part of the ground as on so many others, contrived to raise a cloud of frivolous distinctions, under the influence of which the interests of justice have in numerous instances gone to wreck. In that system of procedure, so far as the use of trial by jury extends, whatever evidence is capable of contributing to form the ground of decision, must be presented, every part of it, within the com-

pass of a given part of a given day. At that period a transcriptural document being presented, if it be a case where a transcript is allowed to be received in place of the original, well and good; if not, and the document is a necessary one to the side of the party by whom it was produced, the cause is lost, for that time at least, *i. e.* in respect of the action then depending: and whether the loss be reparable or no, depends upon a variety of circumstances. If the transcript be presented on the defendant's side, and essential to it; and if the case be of the number of those in which a transcript, or that sort of transcript, happens to be found inadmissible; woe to the man whose lot it happens to be to occupy the station of defendant! If it be the pleasure of the judge to grant him a new trial, on condition of taking his chance for that expensive remedy, the omission may be repaired, the original may be produced. But at the best, and even at that expense, the reparation of the omission, the saving his cause from perdition and injustice, and himself perhaps from ruin, depends not upon himself: whereas, were his station in the cause that of the plaintiff, it would depend upon himself to suffer what is called a *nonsuit*, and, at the price of a fresh action, to substitute the admissible document for the inadmissible one.

On the ground of transcriptural evidence, among the inconveniencies by which suitors are apt to be tormented, those which consist in undue decision or failure of justice having the spuriousness or incorrectness of this species of evidence for their cause, constitute but a small

proportion of the aggregate mass. It is in the triple shape of delay, vexation, and expense, that the principal part of the mischief displays itself.

Transcripts are made of a mass of writing to any extent, where a glance of the original would be sufficient :

Of a mass of writing, of which but a small part is relevant, or at least necessary to the purpose, the whole is transcribed without distinction :

Transcripts are made by an official hand, at an extra expense,—an expense sometimes altogether arbitrary, and most commonly excessive, as being at a monopoly,—where transcripts made at an ordinary expense might afford a lot of evidence equally satisfactory to an impartial or candid mind :

Originals are fetched from unlimited distances, in official, or other appropriate, and consequently high-paid, custody, when transcripts in the way of extract, or even entire, might be obtained and sufficiently authenticated at an inferior price.

The mass of delay, vexation, and expense, which has for its cause any real *bonâ fide* disbelief or suspicion as to the genuineness or correctness of a lot of scriptural evidence, is perhaps not a tenth, not a twentieth, not a hundredth part, of that which has *mala fides*, on the one part or the other, for its cause. In the view of guarding against spuriousness and incorrectness, certain regulations are established. If, in any the most minute particular, party A is found departing from these regulations, party B takes advantage of the flaw. Each party, sure

of being opposed by morally unjust, though legally just, objections on the part of the other, heaps paper upon paper, expense upon expense. A party, though secure in his own mind against objection on the part of his adversary, will, for the sake of inflicting vexation on him, pretend to apprehend vexation from him; or rather, without so much as the necessity of any such pretence, act as if he apprehended it. Agents of the parties, on both sides, and of all descriptions, official scribes of all descriptions, all have an interest in increasing the load by additions in themselves unnecessary; all have pretences for giving birth to such increase; all have it more or less in their power to give birth to it. Judges, by whom such abuses should be watched with a sleepless eye and by an inexorable hand, contribute not so much to reduce the load as to increase it; by useless and groundless punctilios, the result of some caprice of the imagination, — of partial views, in which the contemplation of some ill-chosen means has eclipsed the prospect of the ultimate and proper end, the prevention of the inconveniences so often mentioned.

Parties, their agents, and the subaltern officers of justice, each on his own part aims at profitable injustice: judges second the endeavours of all.

[The papers from which the above remarks on the aberrations of English law have been compiled, were written by Mr. Bentham at different times, and left by him in a very incomplete and fragmentitious state. It appears that he had intended to give some account of what is done by English law in regard to all the different

kinds of makeshift evidence, but never completed his design. The remainder of this chapter, (with the exception of a fragment, which for distinction's sake has been printed in inverted commas,) is the result of a partial attempt to fill up the void which had thus been left in the body of the work.—Editor.]

5. Few questions have been more agitated in English law than those which relate to the admissibility of, and the effect to be given to, different articles of *adscititious* evidence.* The subject occupies sixty closely-printed nominal octavo, real quarto pages, in Phillipps's exposition of the law of evidence. Of a subject thus extensive, more than a very general view cannot be expected to be given in the present work : nor is it necessary for our purpose to go beyond the more prominent features.

One remarkable circumstance is, that the whole body of the rules of law relating to this subject, are, with a very small number of exceptions, exclusionary. Either the decision given in a former cause is said not to be evidence ; and then it is that decision which is excluded ; or it is said to be conclusive evidence : and then an exclusion is put upon the whole mass of evidence, howsoever constituted, which might have been capable of being presented on the other side.

In saying this, enough has already been said to satisfy any one, who has assented to what was said in a former chapter concerning *adscititious* evidence, that nearly the whole of the established rules on this subject, except to the

* See chapter ii. of this book.

extent of the single and very limited case in which it was there seen that exclusion is proper, are bad. Accordingly, the rule that a judgment directly upon the point is conclusive in any future cause between the same parties, is a good rule: it is almost the only one that is.

Even this rule is cut into by one exception: that verdicts in criminal proceedings are not only not conclusive, but are not even *admissible* evidence, in civil cases.* For this exception, two reasons are given: the one, founded on a mere technicality; the other on a view, though a narrow and partial one, of the justice of the case. The first is, that it is *res inter alios acta*: the parties in the civil cause cannot, it is said, have been also the parties in the previous criminal one, the plaintiff in a criminal proceeding being the king. It is obvious, however, that the king's being plaintiff is in this case a mere *fiction*. Although the party in whose favour the previous verdict is offered in evidence, was not called the *plaintiff* in the former proceeding, there is nothing whatever to hinder him from having been the *prosecutor*, who is substantially the plaintiff. Now if he was the prosecutor, and his adversary the defendant, it is evident that the cause *is* between the same parties; that it is *not*, in reality, *res inter alios acta*; and that if it be treated as such, justice is sacrificed, as it so often is, to a fiction of law.

The other reason is, "that the party in the civil suit, in whose behalf the evidence is sup-

* Phillipps, i. 317, *et seqq.*

posed to be offered, might have been a witness on the prosecution."* This is true. He *might* have been a witness; and the previous verdict might have been obtained by his evidence. But it *might* be, that the contrary was the case. Whether he was a witness, or not, is capable of being ascertained. If he was not a witness, why adhere to a rule, which cannot have the shadow of a ground but upon the supposition that he was? But suppose even that he was a witness, and that the verdict which he now seeks to make use of, was obtained from the jury by means of his own testimony. This will often be a very good reason for distrust; but it never can be a sufficient reason for exclusion. Under a system of law, indeed, which does not suffer a party to give evidence directly in his own behalf, it is consistent enough to prevent him from doing the same thing in a roundabout way. A proposition, however, which will be maintained in the sequel of this work, is, that in no case ought the plaintiff to be excluded from testifying in what lawyers indeed would call his own behalf, but which, by the aid of counter-interrogation, is really, if his cause is bad, much more his adversary's behalf than his own. Should this opinion be found to rest on sufficient grounds, the reason just referred to for not admitting the former verdict as evidence, will appear to be, on the contrary, a strong reason for admitting it.

Thus much may suffice, as to the first rule relating to this subject in English law: a rule

* Phillipps, i. 319.

which has been seen to be as reasonable, as the above-mentioned exception to it is unreasonable. We shall find few instances, in the succeeding rules, of an approach even thus near to the confines of common sense.

For, first, a judgment is not evidence, even between the same parties, “of any matter which came collaterally in question, nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment.”* By the words *not evidence*, lawyers sometimes mean one thing, sometimes another: here, however, *not admissible* in evidence, is what is meant. That it ought not to be *conclusive* as to any fact but such as the judgment, if conformable to law, necessarily supposes to have been proved, is no more than we have seen in a former chapter: that, however, because it ought not to be made conclusive, it ought not to be admissible, is an inference which none but a lawyer would ever think of drawing. A common man’s actions are received every day as circumstantial evidence of the motive by which he was actuated; why not those of a judge?

The next rule is, that a verdict or judgment on a former occasion, is not evidence against any one who was a stranger to the former proceeding: that is, who was not a party, nor stood in any such relation to a party, as will induce lawyers to say that he was *privy* to the verdict. The reason why a judgment under these

* C. J. De Grey, in the Duchess of Kingston’s case, apud Phillipps, i. 304.

circumstances is not evidence, is, that it is *res inter alios acta*. But we have seen already* that its being *res inter alios acta*, though a sufficient reason for receiving it with suspicion, is no reason for excluding it.

The more special reason, by which, in the case now under consideration, this general one is corroborated, is, that the party “had no opportunity to examine witnesses, or to defend himself, or to appeal against the judgment.”† This being undeniable, it would be very improper, no doubt, to take the judgment for *conclusive*. On this ground, what is the dictate of unsophisticated common sense? A very obvious one. As the party has not had an opportunity to examine witnesses, to defend himself, or to appeal against the judgment, at a former period, let him have an opportunity of doing all these things now: let him have leave to impeach the validity of the grounds on which the former judgment was given, and to shew, by comments on the evidence, or by adducing fresh evidence, that it was an improper one: but do not shut out perhaps the only evidence which is now to be had against him, merely because it would be unjust, on the ground of that evidence, to condemn him without a hearing. In the nature of a judgment is there any thing which renders a jury less capable of appreciating that kind of evidence, than any other kind, at its just value? But it is useless to argue against one particular case of the barbarous policy which excludes all evidence that seems in

* Vide chap. ii.

† Phillipps, i. 309.

any degree exposed to be untrustworthy. The proofs which will be hereafter* adduced of the absurdity of the principle, are proofs of its absurdity in this case, as in every other.

Another curious rule is, that, as a judgment is not evidence *against* a stranger, the contrary judgment shall not be evidence *for* him. If the rule itself is a curious one, the reason given for it is still more so: "nobody can take benefit by a verdict, who had not been prejudiced by it, had it gone contrary:" a maxim which one would suppose to have found its way from the gaming-table to the bench. If a party be benefited by one throw of the dice, he will, if the rules of fair play are observed, be prejudiced by another: but that the consequence should hold when applied to justice, is not equally clear. This rule of *mutuality* is destitute of even that semblance of reason, which there is for the rule concerning *res inter alios acta*. There is reason for saying that a man shall not lose his cause in consequence of the verdict given in a former proceeding to which he was not a party; but there is no reason whatever for saying that he shall not lose his cause in consequence of the verdict in a proceeding to which he *was* a party, merely because his adversary was not. It is right enough that a verdict obtained by A against B should not bar the claim of a third party C; but that it should not be evidence in favour of C against B, seems the very height of absurdity. The only fragment of a reason which we can find in the books, having the

* See Book IX. EXCLUSION. Part III. DECEPTION.

least pretension to rationality, is this, that C, the party who gives the verdict in evidence, may have been one of the witnesses by means of whose testimony it was obtained. The inconclusiveness of this reason we have already seen.

The rule, that a judgment *inter alios* is not evidence, which, like all other rules of law, is the perfection of reason, is in a variety of instances set aside by as many nominal exceptions, but real violations, all of which are also the perfection of reason. To the praise of common sense, at least, they might justly lay claim, if they did no more, in each instance, than abrogate the exclusionary rule. But if the rule be bad in one way, the exceptions, as usual, are bad in the contrary way.

One of the exceptions relates to an order of removal, executed, and either not appealed against, or, if appealed against, confirmed by the quarter sessions. This, as between third parishes, who were not parties to the order, is admissible evidence, and therefore (such is jurisprudential logic) conclusive: the officers, therefore, of a third parish, in which the pauper may have obtained a settlement, have it in their power, by merely keeping the only witnesses who could prove the settlement out of the way till after the next quarter sessions, or at farthest for three months, to rid their parish for ever of the incumbrance. The reason of this is, "that there may be some end to litigation:"* a reason which is a great favourite with lawyers, and very justly. Liti-

* Phillipps, i. 312.

gation, understand in those who cannot pay for it, is a bad thing : let no such person presume to apply for justice. One is tempted, however, to ask, whether justice be a thing worth having, or no? and if it be, at what time it is desirable that litigation should be at an end? after justice is done, or before? It would be ridiculous to ask, for what reason it is of so much greater importance that litigation between parishes should have an end, than litigation between individuals; since a question of this sort would imply (what can by no means be assumed) that *reason* had something to do with the matter.

What is called a judgment *in rem* in the exchequer, is, as to all the world, admissible, and conclusive. The sentence of a court of admiralty, is, in like manner, as against all persons, admissible, and conclusive. So is even that of a foreign court of admiralty. The sentence of ecclesiastical courts, in some particular instances; this, like the others, is admissible, and, like the others, conclusive. It is useless to swell the list. Equally useless would it be to enter into a detailed exposition of the badness of these several rules. The reader by whom the spirit of the foregoing remarks has been imbibed, will make the application to all these cases for himself.

The law recognizes no difference in effect, between the decision of a court abroad, and that of a court at home. The sentence of any foreign court, of competent jurisdiction, directly deciding a question, is conclusive, if the same question arise incidentally between the same parties in this country; in all other cases, it is inadmissible. The case

of debt, in which it is admissible, but not conclusive, is partially, and but partially, an exception: for even in this case the foreign judgment is, as to some points, conclusive.*

To make no allowance for the different chance which different courts afford for rectitude of decision, would be consistent enough as between one court and another in the same country; in England at least, the rules of the several courts, howsoever different among themselves, being each of them within its own sphere the perfection of reason, any such allowance as is here spoken of would be obviously absurd: that must be equally good every where, which is every where the best possible. Of foreign judicatories, however, taken in the lump, similar excellence has not, we may venture to affirm, been ever predicated by any English lawyer; nor is likely to be by any Englishman; for Englishmen, how blind soever to the defects of their own institutions, have usually a keen enough perception of the demerits, whether of institutions or of any thing else, if presented to them without the bounds of their own country. Were a consistent regard paid to the dictates of justice, what could appear more absurd than to give the effect of conclusive evidence to the decisions of courts in which nearly all the vices of English procedure prevail, unaccompanied by those cardinal securities, publicity and cross-examination, which go so far to make amends for all those vices, and which alone render English judicature endurable? Yet the rule which, in so many

* Phillipps, i. 330—334.

cases, excludes those decisions altogether, errs nearly as much on the contrary side ; for, the difficulty of bringing witnesses and other evidence from another country being generally greater than that of bringing them from another and perhaps not a distant part of the same country, there is the greater probability that the decision in question may be the only evidence obtainable.

After what has been observed concerning the admissibility of prior decisions in English law, little need be said on that of prior depositions. Wherever the decision itself is said to be *res inter alios acta*, the depositions on which it was grounded are so too ; and are consequently excluded. In other cases they are generally admissible : though to this there are some exceptions. Happily nobody ever thought of making them conclusive.

“ * Among the causes which have contributed
“ to heap vexation upon suitors on the ground
“ of evidence, one has been the scramble for
“ jurisdiction, *i. e.* for fees, between the common
“ law courts, and the courts called courts of
“ equity. Such was the hostility, the common
“ law courts refused to give credit to whatever
“ was done under authority of their rivals.
“ Depositions in equity were not admissible
“ evidence at common law. When the work
“ of iniquity is wrought by judicial hands,
“ there must always be a pretence ; but no
“ pretence has been too thin to serve the pur-
“ pose. It consists always in some word or

* Here commences the fragment alluded to in p. 574.

“ phrase : and any one word that comes upper-
“ most is sufficient.

“ The pretence on this occasion was,—a court
“ of equity is not a court of record. A better
“ one would have been, to have said, it is not
“ a tennis court. The consequence would have
“ been equally legitimate ; and the defects of
“ the common law courts, and the effrontery of
“ the conductors of the business, would not have
“ been placed in so striking a point of view.

“ With much better reason (if reason had any
“ thing to do in the business) might the equity
“ courts have refused the application of courts
“ of record to the common law courts. In
“ every cause, the evidence, and that alone, is
“ the essence of the cause ; in it is contained
“ whatever constitutes the individual character
“ of the cause, and distinguishes it from all
“ other causes of the same species : to a cause,
“ the evidence is what the kernel is to the nut.
“ In a court of equity, this principal part of the
“ cause, though not made up in the best manner,
“ is at any rate put upon record, or, in plain
“ English, committed to writing, and preserved.
“ In a court of law this is never done. The
“ evidence, like the leaves of the Sibyl, is
“ committed to the winds. What goes by the
“ name of the record is a compound of sense and
“ nonsense, with excess of nonsense : the sense
“ composed of a minute quantity of useful
“ truth, drowned and rendered scarce distin-
“ guishable by a flood of lies, which would be
“ more mischievous if they were less notorious.

“ In the court of exchequer, the same judges
“ constitute one day a court of equity, another

“ day a court of law. What if the occasion for
“ the rejection of the evidence had presented
“ itself in this court? In the hands of an
“ English judge, the *jus mentiendi* is the sword
“ of Alexander. On the declared ground of
“ iniquity, stopping every day their own pro-
“ ceedings, why scruple to refuse credit to
“ their own acts?”

It is now, however, fully settled, that the answer of the defendant, as well as the depositions of witnesses, in chancery, are evidence in a court of law; and that “a decree of the court of chancery may be given in evidence, on the same footing, and under the same limitations, as the verdict or judgment of a court of common law.”*

The exemplifications which we undertook to give of the defects of English law in relation to makeshift evidence, may here end. To what purpose weary the reader with the dull detail of the cases in which casually-written or *ex parte* preappointed evidence are excluded, with the equally long, and equally dull, list of the cases in which, though exclusion would be just as reasonable (if it were reasonable at all), admission, and not exclusion, is the rule? To know that the established systems are every where radically wrong, wrong in the fundamental principles upon which they rest, and wrong just so far as those principles are consistently applied; this, to the person who regards the happiness of mankind as worth pursuing, and good laws as essential to happiness, is in a pre-eminent degree important and interesting.

* Phillipps, i. 340.

But, for one who, by a comprehensive survey of the grand features, has satisfied himself that the system is rotten to the core; for such a person to know that it is somewhat more tolerable in one part than in another part; that principles which are mischievous in all their applications, are a little more or a little less mischievous in one application than in another; that, in this or that portion of the field of law, vicious theories are consistently carried out, and yield their appropriate fruit in equally vicious practice, while in this or that odd corner they are departed from; would in general be a sort of knowledge as destitute of instruction, as it always and necessarily must be of amusement.

EVIDENCE.

BOOK VII.

OF THE AUTHENTICATION OF EVIDENCE.

CHAPTER I.

AUTHENTICATION, WHAT. CONNEXION OF THIS SUBJECT WITH THAT OF PREAPPOINTED EVIDENCE.

IN the book having for its subject *preappointed* evidence,—in bringing to view the *uses* or *advantages* derivable from that kind of evidence, considered as applied to instruments expressive of contracts, taken in the largest sense; prevention of spurious or falsified instruments, *i.e.* spurious in the whole or in part, was stated as being of the number of those uses.

The function then considered as belonging to the legislator was, so to order matters, that, in so far as contracts have been entered into, genuine instruments expressive of them shall be in existence; and that spurious instruments, instruments expressive of discourses that were never uttered by the persons by whom they purport, or by some one are pretended, to have been uttered, may not be in existence.

So to order matters, as that, when an instrument so framed as above is genuine, it shall be believed to be, and recognized as, genuine; and that, when an instrument purporting or appearing or pretended to be so framed as above is not genuine, but either spurious *in toto* or falsified, it shall be understood that it is spurious or falsified; and, in case of falsification, what are the parts in it that are falsified; is another of the legislator's functions, which remains to form the subject of this book.

On that former occasion, room and demand were seen to exist for something in the way of *regulation*: something, how little soever in comparison of that which has so commonly been done.

On this occasion, there is no demand for any thing whatsoever to be done in the way of *regulation*: whatever is to be done consists wholly of *instruction*; instruction from the legislator, delivered for the information and guidance of the judge.

CHAPTER II.

SUBJECT MATTERS OF AUTHENTICATION,
WHAT. MODES OF AUTHENTICATION IN
THE CASE OF REAL AND OF ORAL EVI-
DENCE.

THREE main species or parcels have again and again been mentioned, as comprising together the whole possible matter of evidence: *real*, *oral*, and *written*. The same term, *authentication*, may be employed with reference to each of them: but the import of it, in the three cases, differs to a certain degree, according to the different natures of the subject matter to which it is respectively applied.

1. In the case of *real* evidence, to authenticate the evidence is to establish the identity of the body (whatever it be) which is the source of the evidence,—the body, the appearances of which constitute the evidence,—together with the authenticity of those appearances: to make it appear, to the satisfaction of the judge, that the body exhibiting certain appearances at the time of its being produced in court or subjected to the examination of a scientific witness (acting on that occasion in the character of a subordinate and deputed judge), is the same body as

that by which the evidentiary appearances were exhibited in the first instance. 2. That the appearances exhibited by it at the two points of time, and during the intervening interval, are the natural consequences of the principal fact, and have not been either fabricated, or materially altered, either by design or negligence.

In the case of *real* evidence, safe custody will commonly besides have another object, viz. insuring the existence and forthcomingness of the object: preventing it from being destroyed or lost. But this purpose belongs not to the present head, but to the head of securing the forthcomingness of evidence.

2. In the case of *personal oral* evidence, to authenticate the evidence is to establish the identity of the person who, in the character of a deposing witness, is subjected to oral examination,—who, in the character of a deposing witness, is admitted to give his testimony in the presence of the judge: to make it appear to the satisfaction of the judge, 1. that he who speaks of himself as being such or such a person, is really that person; 2. that the person who, at the time in question, in presence of the judge, speaks of himself as having been present on a certain past occasion, on which a person known by a certain name was actually present, is that same person: whether, on the occasion in hand, he calls himself or is called by the same, or by a different, name.

3. In the case of *written* evidence, to establish the genuineness of the document is to make it appear, to the satisfaction of the judge, that the document exhibited as containing the

discourse expressed by a certain person on a certain occasion, does really contain the discourse of that same person; and (where the occasion is material) that this discourse did really issue from him on that same occasion.

Correspondent to the respective natures of the respective species of evidence, will be the several courses requisite and proper to be taken for establishing their authenticity.

1. The case of *real* evidence admits of safe custody; an expedient that applies not at all, or not with equally and uniformly unexceptionable propriety, in either of the other cases. For this purpose, a particular sort of person is not unfrequently appointed by law, in contemplation of his presumed trustworthiness with reference to the purpose. He takes charge of the article, keeps it in his possession till the time comes for its being produced, in the character of evidence, before the judge; and it is partly by the fact of his having thus kept it in his custody, partly by the testimony he gives, or is considered as giving, of its having been so kept without any fallacious alteration, that its authenticity is established.

2. The case of *personal oral* evidence, that is, of a person appearing before the judge to give his testimony, admits not of any appropriate mode of authentication. His being the same person as he who (commonly under the same name) is stated by him as having been present on the occasion in question,—been present in the character of a percipient witness,—is included of course in the testimony he gives. The fact of his identity (if there be any doubt about it) will, like any other matter of fact, be to

be proved or disproved, as the case is, by such evidence of any kind or kinds as the occasion furnishes.*

It is not often that in this case the demand for authentication will present itself. A case the most likely to give rise to doubts, is when, for a purpose innocent or criminal, the witness has, on the two different occasions, called himself, or suffered himself to be called, by different names.†

3. It is in the case of *written* evidence that the business of authentication admits of the greatest diversity, and demands a proportionable degree of attention.

The task will be found to be attended with very considerable differences, according to the differences of which the nature of the written

* Safe-custody is an expedient not uncommonly, and in certain cases not unnecessarily, employed, on the person of an individual, for the purpose of securing the exhibition of his evidence. But in this case, as in that of real evidence, safe-custody for this purpose belongs not to the head of authentication, but to that of securing the forthcomingness of evidence.

† The case of the identification of a party must not on this occasion be confounded with that of the identification of a witness. In the case of a defendant in a criminal cause, in whose presence another person in the character of a witness comes forward to depose,—to depose, say in affirmation of the act in delinquency, — a common preliminary address is, Look upon the prisoner; the person now before you, in the character of the defendant, is he the same person of whom you have been speaking, or were about to speak, as the person whom, on the occasion in question, you saw doing so and so? But in this case, the piece of evidence authenticated belongs not to the division of personal evidence, but to that of real evidence: the person whose identity is in question, is not the person of the deponent, but the person of him who is the subject matter of the deposition, of the evidence.

document in question is susceptible: differences that have already been distinguished by appropriate names. I speak of the different modifications of written evidence that have been already marked out, and separately considered, under the general heads of *Preappointed* and *Makeshift* evidence. All these will, in their order, be now for this new purpose brought again to view.

A distinction must here be observed, between evidence of authenticity, and evidence of fairness. Authenticity may be proved by similitude of hands: it may be proved, provisionally at least, *ex tenore*, with or without the other presumption *ex custodia*. To the question of fairness, none of these media of proof, it is evident, can apply. The document may have been brought into existence by any modification of fraud or force, for any indication that can be afforded to the contrary from any of those sources. A bond is produced in evidence:—the obligor may have been in a state of insanity or intoxication when he executed it: he may have executed it with the fear of a pistol or a dagger before his eyes, or in a state of illegal imprisonment, to which he had been subjected for the purpose. Of none of these modifications will the signature, or the custody of the instrument, or the tenor of it, afford any sort of warning.

CHAPTER III.

MODES OF AUTHENTICATION IN THE CASE OF
WRITTEN EVIDENCE.SECT. I.—*Topics of inquiry.*

ON the subject of authentication, as applied to written evidence, two more questions present themselves for discussion: 1. What, with reference to the main end of justice, is, in each distinguishable case, the best, the most trustworthy evidence? in other words, what is the best, with reference to security against deception? or simply thus, what is, in each instance, the most trustworthy mode of authentication? 2. What inferior modes of authentication may, in the several different cases, be admitted in place of the most trustworthy mode?

1. Which is the most trustworthy mode? The authenticity, as above explained, of this or that piece of evidence, is a particular species of fact. Whatever sort of evidence is most trustworthy with reference to facts in general,—to facts taken without distinction,—will be so with reference to this. That sort of evidence is the most trustworthy, which will admit of being

extracted in the most trustworthy mode of extraction. What mode of extraction is most trustworthy has been shewn at large in the books entitled "SECURITIES" and "EXTRACTION:" oral examination, accompanied with cross-examination, and the other securities naturally and usually attendant on it.

This being the most trustworthy, the most satisfactory, and (with reference to the main end of evidence, security against deception) the best and most eligible; two circumstances concur in preventing it from being employed on all occasions. 1. There are occasions on which it is not obtainable: such is the case where, at the time when the demand for the evidence arises, the witnesses from whose mouth it should have been extracted are not forthcoming. 2. There are causes in which, though obtainable, the employment of this most trustworthy species of evidence would not upon the whole be eligible: Why? Because, if obtained in this most trustworthy mode, the collateral inconvenience which, in the shape of vexation, expense, and delay, would inevitably result from the extraction of it in this mode, would be more considerable than the inconvenience consisting in what is lost in point of trustworthiness by the difference between the most trustworthy mode, and the next most trustworthy that may be to be obtained free from that collateral inconvenience.

As to unforthcomingness in evidence, the modifications of it, and their respective causes, have already been exhibited to view. Modifications, irremovable and removable: Causes of irremovable unforthcomingness, death, and

incurable insanity: Causes of removable unforthcomingness, 1. insanity or other indisposition not incurable; 2. expatriation; 3. latency.

SECT. II.—*Modes of authentication in the case of private contractual evidence.*

I PROCEED to bring to view such modes or sources of authentication as present themselves in regard to the different species of written evidence: beginning with private contractual evidence. It is that which affords the greatest variety of modes. The order in which I arrange them is that of superiority: meaning by superiority, preferability, on the score of trustworthiness: the most trustworthy standing first upon the list.

I. Authentication by *direct* evidence.

1. Testimony given by the attesting witness or witnesses. The greater the number of such witnesses, and the larger the proportion of them that appear in the character of deposing witnesses, the more satisfactory, of course, will be the proof. As to the mode of taking the deposition,—the mode of examination,—nothing particular requires, on this occasion, to be said of it. On this occasion as on all others, it will be less and less satisfactory, according as it varies from that which is considered as the most satisfactory, the mode so often described.*

2. Testimony of non-attesting witnesses: representing themselves as having been percipient witnesses of the act of recognition. In that case, the perception taken by any such non-

* See Book II. SECURITIES, and Book III. EXTRACTION.

attesting percipient witness may have been as complete as it naturally will have been in the case of an attesting witness; or it may be less and less complete, in a variety of gradations. A man may have seen and heard what was passing through a chink or key-hole: he may have heard without seeing: without seeing the act of recognition, he may have seen the instrument in the first instance without the signature, and presently after with the signature; and so forth. In this way, the direct evidence may insensibly degenerate into circumstantial evidence.

3. Testimony of the party or parties: all of them, or any inferior proportion of the number. Proof from this source, (supposing all apprehension of mendacity out of the question), will on all other grounds be preferable to that of extraneous witnesses, attesting or non-attesting. The transaction was their own: they are the less exposed to the danger of having forgotten it. The dispute relative to the transaction is their own: they need the less grudge the trouble of coming forward to give their testimony in relation to it. But (especially in the case where the death or unforthcomingness of one of the parties would leave mendacity on the other side without control) it is partly on account of the danger of mendacity from such interested evidence, that recourse is had to the less suspected evidence of extraneous witnesses: and to parties, as well as to extraneous witnesses, it may happen at any time to die, or to be on any other account unforthcoming.

If the testimony of attesting witnesses is produced, the testimony of non-attesting witnesses will naturally be considered as superfluous. But if the authenticity be disputed, and be

rendered more or less doubtful by the evidence or arguments adduced by the adverse party, and at the same time testimony of non-attesting witnesses happens to present itself; it cannot, it is plain, on the ground of superfluity, be excluded.

If, upon the face of it, the instrument appears to have been furnished with attesting witnesses, non-attesting witnesses cannot reasonably be tendered, unless some special cause (as hereinafter mentioned) be assigned for the non-production of any attesting witness. For, the attesting, the preappointed witnesses,—being, upon the face of the transaction, the chosen, and the only chosen witnesses,—cannot therefore but be regarded as more trustworthy than any witnesses taken without choice; unless some special reason be assigned, to shew how it happened that this or that other witness, being also present, and being, by station in life, or character, more trustworthy than this or that attesting witness, was notwithstanding not called upon to put himself upon the list.

II. Authentication by circumstantial evidence.

4. The handwriting proved by *similitude of hands*, asserted by the testimony of a witness, who on other occasions has observed the characters traced by the party in question, while in the act of writing. Presumption from similitude of hands established by view of the act of writing. Presumption *ex visu scriptiois*.

5. The handwriting proved by similitude of hands, asserted by a witness, who, without having ever seen the party write, is sufficiently acquainted with his hand by correspondence: *i. e.* by having received from him letters, purporting (whether by their signature or by their

contents) to be of his handwriting; or by having seen other writings, which, by indications sufficiently persuasive, appeared to have been written with his hand. Presumption from similitude of hands established by view of other writings of the same hand: presumption *ex scriptis olim visis*.

6. The handwriting proved by similitude of hands, asserted by a witness, who, without any such previous acquaintance with the handwriting of the party as above, pronounces the handwriting in question to be the handwriting of the party, on a comparison made of it with other specimens of his handwriting, now, for the purpose of the comparison, produced to him for the first time. Presumption from similitude of hands established by comparison *pro re natâ*: or more briefly, presumption from *comparison of hands*: presumption *ex comparatione scriptorum*, or *ex scripto nunc viso*.

The two former modes may be characterized by the common description of authentication by *acquaintance*: the latter may be termed authentication by *scientific opinion*. The persons called in to give their opinions on a point of this sort, depose in the character of *scientific witnesses*. They will naturally be persons who, by office, profession, or pursuit, have been in the habit of regarding handwritings with a particular degree of attention, with a view to their authenticity or unauthenticity, their similitude or dissimilitude.

The handwriting of the party may (it is evident) form as proper a subject of authentication as that of any attesting witness. It is so even in a more direct way. It is only for the

sake of establishing the concurrence of the party, that the attestation and deposition of the witness are called in. Suppose the authenticity of the party's signature sufficiently established, that of the witness' signature is not worth considering. The causes of suspicion which apply (as above) to the testimony of a party, extend not to his signature: the testimony to the presumed authenticity of the signature of the party is not his own interested testimony, but the uninterested testimony of an extraneous witness.

7. The authenticity of the instrument (the whole taken together), inferred from the consideration of the person or persons in whose possession or custody it has been, from the apparent time of its origination, to the time in hand, or such part of the intervening interval through which the possession of it can be traced. Presumption *ex custodia*.*

* The evidentiary fact is here the *custody* in which, *i. e.* the persons in whose custody, the document in question appears to have been kept.

Proportioned to the antiquity of the instrument, will be the probable number of the persons by whom this situation, with reference to the document in question, has been successively occupied. The last of them (when he is not the only one) will have been the person by whom the instrument is tendered.

Here then comes a demand for spontaneous declaration on this subject on the part of such exhibitant, and for liberty of counter-interrogation on the opposite side of the suit or cause.

Such declaration is itself direct evidence; and, in addition to it, a demand may by accident present itself for ulterior articles of direct evidence, to an indefinite number. But, the purpose of the evidence *ex custodia* being to fortify or weaken the evidence *ex tenore*, and the evidence *ex custodia*, as

8. The authenticity of the instrument (the whole taken together), inferred from the consideration of its tenor, or say *contents*. Presumption *ex tenore*.

9. The authenticity of the instrument (the whole taken together), exhibited by a subsequent indorsement: an entry made upon the back or other vacant part of the paper or parchment, in a hand purporting to be that of some official person, and expressive of the fact of its having, in the character of an authentic instrument, been subjected to his inspection in virtue of his office. Presumption *ex visu officiali*.

By this species of evidence, the question in regard to authenticity is rather shifted off, than solved. Superinduced upon the original instrument is another piece of writing, which, as being a writing, requires authentication, as well as the original instrument. An indorsement of this kind may be considered as a supplemental written attestation added to the instrument, at a subsequent point of time to that of the execution of the instrument.

The memorandum in question, was it really written by or by the order of the person, by or by whose order it purports, upon the face of it, to have been written? It is only by circumstantial evidence, that to this question an an-

well as that *ex tenore*, being both of them, with relation to the fact of the genuineness of the document, of the nature of circumstantial evidence; hence it is that all direct evidence, which has for its subject the history (as it were) of the document, the enumeration of the different hands into which, from the time of its birth, it has successively passed, comes under the head of circumstantial evidence: for it is but rarely that, without the intervention of direct evidence, circumstantial evidence finds its way into the presence of the judge.

swer can with propriety (at least in case of dispute) be given. By direct evidence, yes ; if he be alive and forthcoming : but if he be, then, at an earlier or later stage of the inquiry, not any such circumstantial evidence, but this direct evidence, will, for the purpose in question, be the most satisfactory, and therefore the most proper, and ultimately the only proper, evidence.

In ancient times, when, by various circumstances connected with the immaturity of the human mind, forgeries were rendered much more easy and much more frequent than at present; an incident not unfrequently exemplified is that of an official person visiting the written instruments deposited in this or that official receptacle, and (to serve as proof of their genuineness) writing or causing to be written upon each, a memorandum to the effect here spoken of.

Of the sort of apparent certificate or judgment here in question, the effect is, to declare the opinion of somebody, that the instrument on which it is marked was genuine ; was not a forged one. If the principal, the substantive, document, be not incapable of having been taken for the subject or made the product of an act of forgery, neither is this subsidiary, this adjective, instrument. But forasmuch as, to each of any number of forgeries, (especially if so many different hands, purporting to have been written at so many different times, be taken for the objects of imitation), a separate set of difficulties stand opposed ; the consequence is, that to any such apparent certificate it can scarcely happen to be altogether

destitute of probative force. Some probative and authenticative force a document of this sort will always have, whereby, to the amount of it, it will make an addition to the intrinsic self-probative force possessed by the principal instrument itself; the evidence or presumption *ex tenore*.

As in the case of the original subject matter, so in the case of this adjunct, evidence *ex tenore*, corroborated with evidence *ex custodia* for the corroboration of it, will in general be the only evidence on the ground of which a judgment concerning the genuineness of it can be formed.

To these it may now and then happen that the evidence *ex collatione* may be addible: viz. where, in the same repository, or in other accessible repositories, manuscripts which by their physical tenor appear to be of the same handwriting are to be found; manuscripts capable of being employed in the character of *standard scripts*.

In the three cases where the conclusion is founded on a supposed similitude of hands, the superiority in quality ascribed to the prior in order cannot with propriety be ascribed to it but under certain conditions and limitations.

1. As between presumption *ex visu scriptiois*, and presumption *ex scriptis olim cognitis*. If, of two witnesses, each has, within the same compass of time, seen an equal number (*ten* suppose) of scripts derived from the same hand,—of which two witnesses, one only had, in the instance of one or more of these scripts, been an eye-witness of the act of writing; the evidence of him by whom that advantage had been possessed, could not but, in a theoretical point

of view, be regarded as the better evidence. Why? Because the mode of cognizance that fell exclusively to his lot, is, with reference to each such object of comparison, of the nature of direct evidence: the other is but presumptive, circumstantial evidence. In a practical view, however, the difference can seldom be worth regarding; especially if the way in which the cognizance was obtained was that of epistolary correspondence. When, from an individual more or less known to me in person or by reputation, I receive a letter, bearing his signature; that is, when I receive a letter with a signature purporting to be that of a person known to me as above; on what supposition can such a letter have emanated from any other hand than his? On no other than that of forgery: a crime not to be presumed, or so much as suspected, without special ground, in any single instance: much less, in a number of unconnected instances.

Suppose, on the other hand, the writings of the same hand seen by one witness in ten instances, without seeing the act of writing in any of those instances; while, by the other witness the act of writing was seen in one instance only, he not having seen any other writings of the same hand: in this case, the evidence of him who had never seen the act of writing, would surely be regarded as the most satisfactory of the two.

So likewise in the third case, as compared with the two former ones: the case of *scientific* evidence, as compared with authentication under favour of opportunities derived from *acquaintance*. If, in respect to qualification for

forming a right judgment, any advantage be afforded by opportunities derived from acquaintance, it can only be by reason of the comparatively greater number of opportunities. The number of opportunities of this sort derivable from personal acquaintance may have been considerable in any degree, and, upon a general view of the subject, will naturally appear indefinite. The number of data of this kind put into the hands of a scientific witness on the occasion in question, or on any one occasion, for any one particular purpose, will seldom be considerable, and will always be definite. But,—suppose the opportunities of observation equal in every respect, as between the witness speaking from particular acquaintance, and the witness speaking from general and appropriate science,—the superiority naturally belonging to the latter, by reason of the superior intensity of attention, and the superiority of appropriate intelligence naturally resulting from it, will be sufficient in general to bestow upon the value of his opinion a decided superiority. The witness speaking from acquaintance has (for example) received from the individual whose hand is in question, ten letters, and no more: and that, suppose, in the compass of two years. Let these same letters be put all at once into the hands of a scientific witness, together with the writing to be judged of, the advantage afforded him by his science must be inconsiderable indeed, if it does not render his opinion on the subject of more value than that of the unscientific witness, judging from particular acquaintance.

The case in which the presumption from

custody is most apt to be called in, is that where the deed to be authenticated comes under the notion of an *ancient* deed. *Antiquity*, in this respect, not being designative of any particular length of time, to the exclusion of all others; to give precision to our conception on the subject, it will be necessary to particularize some determinate length of time, beyond which (reckoning from the day of the exhibition of the deed in evidence) it shall be deemed an ancient one,—say, therefore, thirty years. Of the lapse of such a length of time, a natural and frequent consequence is, that all means of authentication by particular acquaintance shall, to a person in the situation of the party having occasion to authenticate the deed, be unattainable. Here then comes in the presumption from custody. Here is a deed signed, having, for the name of one of the parties, the name of one of my grandfathers. I myself never saw him; consequently, never saw him write. I can think of no person now living, who, to my knowledge, ever saw my grandfather, or had any correspondence with him. But upon the death of my father, on taking a survey of his effects, I found in a box this amongst other deeds.

The presumption *ex tenore* is the *medium authenticationis* that remains to be resorted to when all others are unattainable: it is a proof, and the only proof, that can never be wanting. The presumption *ex custodia* includes it, and, implicitly at least, is grounded on it. When I conclude the granter of that deed to have been my grandfather, it is not merely because it was once in the custody of my grandfather,

but because, from the tenor of it, it is a deed in which my grandfather, in his time, could not but have had an interest. But, though the presumption *ex custodiâ* cannot present itself unaccompanied by the presumption *ex tenore*, yet the latter may without the former; and it is for this reason that the two sources of authentication are stated as separate. By accident, it might have happened to the deed to have been found in a receptacle not within my custody: by accident, it might have been found in a public road or street, into which it might have fallen by the accidental disruption of a package in a vehicle to which it had been consigned: by accident, it might have been found in a chandler's shop, into which it had found its way by negligence, amidst a bundle of waste papers.

By this single presumption, unassisted even by the presumption *ex custodiâ*, deeds and other scripts are, in various cases, considered as sufficiently authenticated, under the actually established system of jurisprudence. They are so, for example, in English jurisprudence. A deed which is considered as sufficiently authenticated by the presumption *ex tenore*, is, in the language of that law, said *to prove itself*. Such is the phrase, in the language of one of those classes of men whose self-complacency is never so exulting as when they triumph, or seem to triumph, over reason. To have said, the authenticity of a deed may be presumed in certain cases from the tenor of it, would have been to have stated, not only the decision itself, but the consideration on which its claim to be regarded as a proper one

depends. In the expression, in certain cases a deed *proves itself*, a decision to the same effect is expressed; but, in the place of the reason, it gives a paradox: an absurdity, if not in reality, in appearance: a sort of appropriate and professional figure of speech, of the same stamp with those by which, in so many other instances, these professional men seek to hide their meaning from the view of other men, and on which they love to found their claim to the praise of superiority in science.

SECT. III.—*Modes of authentication in the case of written official and casually-written evidence.*

THE principal points of consideration being thus stated under the head of *private contractual evidence*, being that which affords them in the greatest variety; the two remaining classes of written evidence, official evidence and casually-written evidence, will give us but little trouble.

I. *Written official evidence.* If, in the case of private contractual evidence, evidence issuing from an interested and thence suspected source, authentication *ex tenore* appears satisfactory, much more may it in the case of official evidence; evidence from a source, generally speaking, untainted by interest, and therefore unsuspected. In the case of private contractual evidence, the circumstance of custody, though material in itself, and, for the sake of one or other of the parties, necessary perhaps to be brought to view, contains in it matter of suspicion as well as confidence. The deed, according to my statement, has, from the time of

the date of it, been either in my own custody, or in that of some progenitor or predecessor of mine; and this custody I allege as an indication serving to shew the person appearing upon the face of the deed as a party to it, to have been really so. Good: supposing my statement in this behalf to be true; but supposing the deed fabricated or fraudulently altered by my hand, will not its having been in my custody be a still more necessary consequence? If, instead of having been in a custody thus open to suspicion, it had been in the joint custody of a set of official persons not capable of deriving any advantage from any such forgery, the presumption *ex custodia* could not but be much clearer of suspicion, much more satisfactory and conclusive. Hence, as already intimated, one of the main advantages and uses of official custody for the purposes of official evidence.*

2. *Casually-written* evidence. The same modes of authentication which apply to the two just-mentioned modifications of written evidence, apply in general to this. Two exceptions alone, and those altogether obvious, present themselves. Attesting witnesses are out of the case: the characteristic property of preappointed evidence, and therefore of private contractual evidence, if exhibited according to preappointed forms, being to exhibit this source of authentication; that of casually-written evidence, not to exhibit it.†

* See Book V. PREAPPOINTED.

† Unless, to a writing unofficial, and not bearing relation to any purpose which contractual or other legal writings, usually drawn up in legal form, have in view, the author or

Persons casually present may happen to have been percipient witnesses of the act of writing, in the case of the unsolemn document, as in the case of the solemn one: but writing in general is not a social work. Epistolary writing affects solitude; and so does the act of literary composition, as well as the act of making memorandums for self-regarding and domestic use. This is more particularly and obviously the case with regard to that large division of casually-written evidence, which is most apt to be exhibited in causes of a penal nature, and consists of documents obtained through the indiscretion or negligence of the writer, and produced against him in the character of confessorial evidence.

Oral examination of the alleged writer of the script, is evidently, in a general point of view, the most eligible mode of authentication. It is plainly so in the relation of a means to the main end—the discovery of the truth. Supposing the writing to be mine, there can be no one of whom it can be so certain that he knows whose writing it is, as myself; that one percipient witness, who, in the nature of things, cannot fail to have been a percipient witness of the act. Other witnesses to it there may have been, or not been, as the case may be.

This first choice remains at the same time susceptible of exceptions; partly on the ground of practicability, partly on the ground of eligibility.

authors, having authentication in view, should call in the assistance of some other individual or individuals, in the character of attesting witnesses.

1. The writer himself may be unamenable to the commands of justice: either for ever, as in case of death, or incurable insanity; or for a time, certain or uncertain, as in case of expatriation, latency, sickness.

2. The writer may, in respect of the fact in question, be bent against the declaration of the truth. This fact may either have been already ascertained by experience, or may only be presumed, or deemed presumable: presumable, either on *general* grounds, from his station in the cause; as when he is defendant in a cause of a highly penal nature, and the instrument (supposing it genuine) is a document capable of serving as conclusive evidence of his delinquency: or on *particular* grounds; as, for example, his moral character: particularly in respect of veracity, the quality particularly in question in this instance.

3. In respect of delay, vexation, or expense, the choice of the writer himself for the authenticating witness may be attended with a degree of inconvenience, such as, either in the whole or in part, may be avoided by resorting to some other witness.

CHAPTER IV.

MODES OF DEAUTHENTICATION IN THE CASE
OF WRITTEN EVIDENCE.

IN the question relative to authenticity, the affirmative proposition is, as already observed, except in here and there an extraordinary instance, the true one. The affirmative is therefore, under that exception, the proposition that comes to be proved: the negative, not; except in the extraordinary instances just spoken of. But, since instances of this description, how extraordinary soever, are unhappily found to exist, hence an operation opposite to authentication comes sometimes to be performed. Correspondent, in good measure, to the list of modes of authentication, will consequently be the list of modes of *deauthentication*. In the main, they will consist of the negation, or the reverse, of the modes of authentication: but with some variations and additions, as the tenor of them will shew.

Modes of deauthentication:—sources from which a persuasion that the document in question is spurious or falsified, may be obtained.

I. Direct evidence.

1. Testimony (disaffirmative) of attesting wit-

nesses ; *i. e.* of persons mentioned in the instrument as attesting witnesses.

2. Testimony (disaffirmative) of non-attesting witnesses ; *i. e.* of persons not mentioned in the instrument as attesting witnesses.

3. Testimony (disaffirmative) of the party against whom the document is produced, and who denies his having authenticated it ; denies the handwriting to be his ; or, if signed as if by him, denies the signature to be his signature.

4. Testimony (disaffirmative and confessorial) of the party by whom it is produced, (*viz.* the party in the cause) ; and who, on being cross-examined or otherwise, confesses, either that he himself bore no part in the document in question, or that the other supposed party to the transaction (whether a party to the suit or no) bore really no part in it ; in a word, that in one way or other it is *spurious* ; or that, if there are certain portions of it in which they respectively bore a part, there are others in which they respectively did not bear any part : that is, that, in respect of a certain portion or portions of it, it has been *falsified*.

5. Hearsay evidence : testimony of any person whatever, (attesting witness, non-attesting witness, or party), declaring himself to have heard (on the part of an attesting witness, a non-attesting witness, or a party, by or in whose favour the document is produced) a discourse amounting to an assertion of its being *spurious*, or having been *falsified*.*

* Hearsay evidence of this description (the supposed extrajudicial evidence of the supposed percipient witness, being supposed to have been delivered *mortis causâ*) has actually

II. Circumstantial evidence.

1. Dissimilitude of hands, deposed to *ex visu scriptiois*.

2. Ditto, *ex scriptis olim cognitis*.

3. Ditto, *ex scripto nunc viso*; the document in question being now inspected by some scientific eye, and, on being confronted with other scripts indubitably from the same pen, pronounced dissimilar.

4. Ditto, from the appearance of its being a feigned hand.

5. Presumption *ex custodiâ*: the party producing it, or a person through whose hands it has passed, being the person who in case of success would be a gainer by having fabricated or falsified it, or procured it to be fabricated or falsified, to the effect suspected.

6. Presumption *ex tenore*: marks of spuriousness or falsification apparent on the face of it.

Indications of spuriousness or falsification, apparent on the face of a written discourse, may be presented either by the physical entities of which the signs are composed, or by the consideration of the discourse signified.

I. Indications afforded by the paper, parchment, or other substratum, on which the colouring matter is laid.

been admitted, and, as it should seem, credited, in English law. "In ejectment" (says Hawkins) "when a will was produced on the part of the plaintiff, subscribed by three witnesses, two of whom were dead, and the third witness on her cross-examination swore, that while she was attending one of the deceased witnesses in his last illness, and about three weeks before his death, he pulled the will in question from his bosom, and acknowledged and declared to her that the said will was forged by himself; this was held good evidence."—*Hawkins*, 50.

1. Paper, if of a date known to be posterior to the date apparent on the face of the instrument, a certain proof of spuriousness.

2. Paper,—if in any part the surface exhibit a roughness and comparative thinness, such as would be produced by an erasure (*i. e.* the scratching of an edged or pointed instrument),—a cause for suspecting falsification.

3. Paper,—if, in any part which appears to have been written upon (as, for example, in the middle of a line of writing), a stain appears, such as might have been produced by a solvent, applied for the purpose of dissolving the ink or other colouring matter of which the characters are composed,—another cause for suspecting falsification.

N.B. Indications Nos. 2 and 3, apply alike to parchment, vellum, or any other substratum consisting of skin.

4. Ink. If the colour of the ink, being uniform throughout, appear of a colour fresher than what (as supposed) it would have been if written at the time of the date, this freshness may be thought to afford some suspicion of spuriousness. Very little reliance, however, can safely be placed upon this circumstance. In respect of quality of colour, intensity of colour, and glossiness, the difference may be as great between two inks made at the same time, as between two inks made at different times.

5. Ink. If the appearance of the ink be different in different parts of the same writing, such difference may afford a ground for suspecting falsification. In this case, the reason may be considerably stronger than in the last preceding one. If, to an ink employed in the

first instance, there succeeds another sort of ink, which continues to be employed to the end, scarce any cause of suspicion can be afforded by this change: the natural interpretation is, that the penman, not being satisfied with the ink, or perhaps with the pen that he found in one inkstand, betook himself to another ink, or to another pen that he found in another inkstand. The only case in which any considerable cause of suspicion can be deduced from this source, is that in which the different kind of ink appears in spots and patches, having ink of the first appearance on each side of it. In this case, two other indications will be to be looked out for: 1. Marks of a discoloration or stain, or of roughness and thinness, according to the nature of the chemical or mechanical means employed for the obliteration of the pre-existing characters; 2. The probable import and importance of the words obliterated, as deducible from the context.

II. Indications of spuriousness or falsification afforded by the nature of the *discourse* signified.

1. In the script in question, mention (direct, or in the way of allusion more or less oblique) made of facts of later date: *i. e.* of facts that did not come into existence but at a time posterior to the date expressed on the face of the instrument. Facts; viz. things, persons, or events; or situations or other appearances of things or persons.*

2. In the script in question, words or combinations of words, or modes of spelling, known

* See Book I. Chap. 3.

not to have been in use but at a time posterior to the date.

3. In the script in question, mention made of pretended facts, of the non-existence of which the individual in question is, from other sources, known to have been conscious: supposed facts, for example, inconsistent with other facts, of the existence of which he is known to have been conscious. In a deed (for example) recital of a fact, the falsity of which could not but have been known to him at the time. From this circumstance, it is evident, no indication of spuriousness or falsification can be deduced, any further than as the absence of mendacity on the part of the supposed author is assumed.

4. In the script in question, it being a contract (viz. either an instrument of conveyance or an instrument of engagement), engagements or conveyances incompatible with prior conveyances made, or engagements entered into, by the individual in question, or known by him to have been respectively made or entered into by those in whose place, in that respect, he stands. From this circumstance, no indication of spuriousness or falsification can be deduced, any further than as the knowledge on his part of the disposition of law in this behalf, and the absence of improbity on his part in this respect, are assumed.

5. In the script in question, indications of a character manifestly superior or inferior to that of the individual in question, in respect of learning, intelligence, veracity, or any other branch of morality, as established by other writings, discourses, or actions of his, suf-

ficiently ascertained. This indication is in a manner confined to scripts belonging to the head of casually-written evidence, such as letters, memorandums, and literary compositions; in contradistinction to such as belong to the respective heads of *private contractual evidence* and *official evidence*.

6. In the script in question, opinions, affections, or tastes, manifestly opposite to those of the individual in question, according to information satisfactorily deduced from other sources. This again is in a manner confined to casually-written evidence, as above.

7. In the script in question, the style, phraseology, or mode of spelling, manifestly dissimilar to those of the individual in question, ascertained from other sources. The idea attached to the word *style* being as yet extremely vague, the indication grounded on it will be proportionably vague. Another indication that applies principally to written evidence of the casual kind, as above.

8. In the script in question, the style or phraseology manifestly dissimilar to that in use in the *office* in question. This, upon the face of it, applies exclusively to official evidence.

CHAPTER V.

DISTINCTION BETWEEN PROVISIONAL AND DEFINITIVE AUTHENTICATION. RULES FOR THE LEGISLATOR AND THE JUDGE, CONCERNING THE AUTHENTICATION OF WRITTEN EVIDENCE.

SUCH being the possible modes of authentication; next comes the inquiry, which mode on each occasion ought to be required?

For this purpose, a distinction must be taken, in the first instance, between provisional authentication, and definitive.

By provisional, I mean, that evidence which may be received as sufficient for the authentication of the evidence in question, provided that no suspicion of its authenticity is expressed on the other side. By definitive, I mean that which, if satisfactory in itself, shall be deemed sufficient proof of the authenticity of the instrument, notwithstanding all protestations and contestations on the other side.

For the purpose of provisional authentication, (that is, in all ordinary cases), that mode of authentication will be the most eligible, which in each instance can be employed with least vexation, expense, and delay. But, should the

authenticity of the document be disputed on the other side,—in a word, should it be accused of forgery, — in such case the subordinate consideration referring to these collateral inconveniences must give way to the superior consideration referring to the direct justice of the case : always supposed, that the imputation of forgery may not be allowed to be made through mere wantonness, much less in the express view of giving birth to those collateral inconveniences ; and that, accordingly, in the case of *mala fides* or temerity, the burden of the inconvenience may rest ultimately on the head of the party to whose misconduct it owed its birth.

If the mode of authentication which is not needful but in case of contestation, be regularly employed where there is no contestation, where no doubt of the authenticity of the document is really entertained ; and if, between the modes of authentication necessary in the two cases, there be upon an average any considerable difference in respect of vexation, expense, or delay ; the aggregate mischief unnecessarily produced in those three shapes must be prodigious indeed. Among the writings of all sorts which come to be exhibited in a court of judicature in the character of evidence, if there be one out of a thousand in respect to which any such suspicion is really entertained, the proportion would prove much larger than I should expect to find it. Upon this supposition, in nine hundred and ninety-nine instances out of every thousand, this mass of inconvenience will be created without necessity or use, if, in pursuit of a phantastic idea of regularity, the em-

ployment of the definitive mode of authentication be insisted on, to the exclusion of the provisional mode: the most convenient, *i.e.* least vexatious, expensive, and dilatory mode, which might so unexceptionably have supplied its place. This oppressive plan of authentication we shall find established in English jurisprudence.

In the adjustment of the modes of authentication to be established in regard to written evidence, the leading points or ends require to be kept in view: on the one hand, satisfaction in respect of trustworthiness; on the other hand, avoidance of delay, vexation, and expense, the three inseparable modifications of collateral inconvenience.

Of these two ends, this first-mentioned, being the main and principal end, has in general been pursued with a degree of preference, which would have been very proper, but that the sacrifices that have been made to it, at the expense of the triple collateral end, have been inordinate, and much beyond any thing which good economy in this respect would be found to authorize.

The supposition upon which judges and legislators have proceeded, in the fixation of the modes of authentication which they have prescribed, has been that of a universal and constant disposition on the part of all suitors to commit forgery: or, if that supposition has not in every instance been actually entertained, it is the only one on which the modes prescribed are capable of being justified; the only one by which the price paid, in the shape of delay, vexation, and expense, for the supposed advan-

tage in the shape of satisfaction in respect of trustworthiness, would not be recognized to be excessive and oppressive. If, among a thousand cases in which the legal *effect* of a piece of written evidence is in dispute, there be not so much as one in which the *authenticity* of it is a matter of real doubt on the part of the suitor against whom it is produced; it is only in the one case where it is matter of real doubt, that the price paid for authentication in the shape of delay, vexation, and expense, or all together, need be so considerable as to be worth counting. Under the existing system, there is scarce a cause in which it is not considerable, and in many a cause it would be found to be seriously oppressive.

Thus it happens, that, for one grain of mischief produced, or that would or could be produced, by fraud in the shape of *forgery*, a thousand, ten thousand, are produced by fraud in the shape of *chicane*: of chicane, produced partly by the enmity of suitors, partly by the rapacity of their agents, abetted by that of the subordinate officers of justice: both passions protected and encouraged and engendered by prejudice and indifference on the part of judges and legislators. Familiarized with the spectacle of continual misery, generated according to rule and custom, and therefore on their parts without blame; the reduction of the mischief to its minimum, the reduction of it so much as within any narrower bounds, never presents itself to them as worth regarding. Like so many other processes which go on as it were of themselves, according to pre-established and never-considered rules, the authentication of

evidence is considered as a sort of mechanical operation, the pathological effects of which have no claim upon them for so much as a thought. Whence all this composure? For the observance of the established rules, the man in office is responsible: for the propriety of these rules, for their subservience to the ends of justice, he is not responsible.

To attempt in this place to combat the triple-headed monster by any proposed regulations of detail, would be to touch upon the topic of procedure: a general observation or two may serve to indicate the course. Authentication in the ultimate, and what may be stiled the adverse, mode, ought, instead of being the routine of practice, to be the *dernier resort*, the extraordinary recourse. The process of authentication should be carried on, not at the time of trial, but between party and party, at a preliminary meeting, either in the presence of the judge, or before some inferior minister of justice, whose time can best be spared.*

The party who has a document to produce, produces it in the first instance to the adverse party, who either admits the authenticity of it, or declares his intention to contest it. If he admits it, he marks it as admitted. If he chooses to contest it, he has a right to do so, but he uses it at his peril; at the peril of simple costs in case of simple temerity, at the peril of extra costs in case of *mala fides*. The end in view is, in every instance, to save the suitors from the delay, vexation, and expense, of ad-

* In the following book, the necessity of such a preliminary meeting, for innumerable other purposes as well as this, will be fully shewn.

verse authentication, in so far as these several inconveniences are avoidable. The means to be employed in the prosecution of that end, is the taking such arrangements as shall make it the indisputable interest of every individual concerned, each in their several stations, (parties, agents of parties, officers of justice of all classes), to abstain from giving birth to these several inconveniences, any further than as they are necessary.

The virtual penalty inflicted on this occasion by imposition of costs with the above views, should not depend on the ultimate decision of the cause, but should be inflicted *pro unaquâque vice*, for each act of authentication unnecessarily performed. Otherwise, to the enmity of a suitor who was persuaded of his having the law on his side, the proposed remedy would apply no check. The principle would remain unapplied, unless, to each particular act of vexation, its own particular penalty stood opposed.

On the subject of the supposed proportion between the number of the cases in which suspicion of spuriousness has *not* existence, and that of those in which it *has* existence, one observation there is, which, to every person to whom the practice of technical procedure is familiar, will be almost sure to present itself.

“Number of cases” (says the objector) “in which no suspicion of spuriousness is entertained, nine hundred and ninety-nine; be it so: number of cases in which suspicion of that sort is really entertained, one, and no more; be this likewise, for argument’s sake at least, admitted. But, in addition to the one case in which any

such suspicion is really entertained, what is there to prevent the bringing forward a *pretence* of suspicion, in an indefinite multitude of other instances? and in particular (for example) in every instance in which the party who is in the wrong (suppose the defendant) has more to gain than to lose by the delay, or, on either side of the cause, entertains a hope of forcing his injured adversary out of the field of litigation by the pressure of the expense."

The answer is; the state of things on which the above question grounds itself, is the existing state of things under the reign of technical procedure. But, in respect of the matter in question, the state of things here supposed is exactly opposite.

It being the policy of the existing state of things (for the sake of giving every practicable increase to the number of causes, and to the profit extractible from each) to give every possible increase to the number of *malá fide* defences and demands, as well as to the number of the *operations* performed, and to the number and length of the *instruments* exhibited, on the occasion of each such suit, *boná* and *malá fide* such taken together; and, to that end, to afford to wilful falsehood and insincerity, in every imaginable shape, every practicable facility and encouragement; falsehood and insincerity in the parties litigant have accordingly been exempted, with little exception, from the check of counter-interrogation in every shape, and without any exception, from the check of counter-interrogation in the *vivá voce* shape.

But, in the state of things here in question, whatsoever, on this or on any other subject,

were said by a *party* on either side of the suit or cause, would be said under the influence of whatsoever securities for correctness and completeness are or would be applied to the case of an *extraneous witness*: under the influence of *viva voce* counter-interrogation at any rate: under the check of an oath, if, notwithstanding the objections brought forward in this work against that ceremony, it were thought fit to be retained; if not, under the check of a solemn and deliberate averment.

A party *contestant* would no more have it in his power to reap any advantage from a naked averment, declarative of a belief on his part in *disaffirmance* of its genuineness, or of a suspicion of its spuriousness, than the party *exhibitant* could do, from a naked averment, declarative of a belief on his part in *affirmance* of its genuineness. Each would alike be liable to be called upon (and under the same securities for sincerity as in the case of any extraneous witness) to state, in the most explicit manner, the grounds of the persuasion professed by him to be entertained.

To rash, as well as to *malâ fide* contestation, various are the other checks that might be, and, if the ends of justice were the objects, naturally would be, applied. If, for example, by the production of a source of evidence, the needfulness of which (after the mutual explanations in question) appeared more or less doubtful to the judge, delay and expense to a certain amount would manifestly be necessitated; — not only would eventual compensation for the damage by such delay be secured; as well as the expense attendant on the production of the

evidence in question cast of course upon the party by whom the production of it was thus insisted on;—but if, by the exhibition of this evidence, a demand for *counter-evidence* to be exhibited by the adverse party were produced, the expense of such counter-evidence might provisionally be charged, in the first instance, upon the party thus insisting: rather than that by such means it should be in his power to oppress his adversary, by exhausting his means of maintaining his post in the field of litigation; his means of pursuing, in the character of plaintiff, his own claim, or repelling, in the character of defendant, that of the party on the other side.

In some cases, for the purpose of provisional authentication, instead of the executed, or rather say *recognized*, instrument, a *transcript*, or an *archetypal draught*,* may be employed.

Several cases may be mentioned, in which, supposing less delay, vexation, and expense, to be necessary to the adequate authentication of this succedaneous script, than to that of the proper instrument, the substitution may be employed with advantage.

Note that, for the purpose of *discussion*, on the ground of the *contents*, subject to eventual correction, the succedaneous script may serve exactly as well as the proper instrument.

* *Archetypal*; i. e. the corrected and settled draught from which the instrument itself was transcribed, and which served as an *archetype* or *original* to it. The appellation *rough draught* would not have served; since nothing hinders but that this original, to which no signatures have been attached, may have been no less fair than the instrument which (being transcribed from it) became the subject of the act of recognition, and in consequence received the signatures.

If, in so far as, under the contract in question, the dispute turns upon the point of law, the question of law is decided against the exhibitant (plaintiff or defendant); the delay, vexation, and expense, of which the exhibition of the proper instrument would be productive, may, if worth saving, be thus saved.

Supposing that there is no question of law, or, if there be, that the question is decided in favour of the exhibitant; in either case, allowance of his claim follows of course, upon the supposition of the conformity of the succedaneous script thus exhibited to the proper instrument, of which the genuineness as well as the existence is thus, provisionally at least, supposed. Supposing the exhibitant to be the plaintiff; in this case, upon the authority of this succedaneous script, even *possession* might be delivered to him, if adequate security be given by him for eventual restitution *ad integrum*; *i. e.* for putting the adversary in a plight in every respect as good as if the possession had not been changed.*

* In actual practice (Peake, p. 64), where the supposed authentic instrument has, according to the evidence (but *quære what and whose evidence?*) been *lost*, (but *quære whether known to have perished, or, after search, simply not found?*) a statement made of the supposed contents, from mere memory, has been received instead of it. To how prodigious an amount, in this real case, is the danger of abuse and mischievous misdecision greater than in the above supposed and proposed case! Supposing the fact of such deperition out of doubt; on this supposition, all check to intentional and mendacious misrepresentation of the supposed contents of the instrument, has perished along with it: and as to *unintentional* misrepresentation, who does not see how slight the security against it is in this *real* case,—how strong, and all but complete, in the *supposed* case? Unless the witness or witnesses

Of the actual execution, and thence of the genuineness, of the proper instrument,—so likewise of the correctness and completeness of the succedaneous script; even in case of contestation or doubt,—for saving of delay, vexation, and expense, evidence less conclusively probative than for the purpose of a *definitive* decision might be necessary, might, for the purpose of a *provisional* decision, be received on either side.

Even if contested, a script which is authenticated *ab intrà* (*i. e.* which, on the face of it, presents the signature of the apparent author, affixed to it for the evident purpose of authentication) need not be authenticated *ab extrà* in the first instance. Why? Because, unless it be supposed to be tainted with forgery, its authenticity cannot appear dubious. But delinquency ought not in any case to be presumed without special ground; much less delinquency of so high a cast.

Inability to effect the authentication of a script on or before a certain day, need not, ought not, to be rendered so much as a cause of delay, much less of ultimate miscarriage. The decision, a decision in all other respects ultimate, might be made provisional, dependent upon the subsequent authentication of the instrument on or before a day to be named: nor need even that nomination be so inexorably

by whom (in speaking of the succedaneous script as genuine) the proper instrument is spoken of not only as being genuine but as being in existence, say thereby what is not true,—there the scripts remain, both of them, capable of being confronted at any time, until one of them is lost or destroyed.

peremptory, as to allow accident, much less fraud, to triumph over justice.

Note, that, in all these cases, the advantage and propriety of giving admission (provisional admission and effect) to such succedaneous evidence, depends upon the relative quantity of the inconvenience saved by it, in the shape of delay, vexation, and expense. But let it not be forgotten that to this quantity there are no limits, other than those of the earth's circumference.*

* About forty years ago, in a statute relative to East India affairs, (26 Geo. III. c. 57. sect. 38., Peake, 66.) provision was made, that, — in the case of written evidence of a certain description, written and attested in the East Indies, — for the authentication of any such article of evidence in Great Britain, proof of the handwriting of the persons whose signature appeared on the face of the instrument, should suffice: and this too for definitive authentication, and without a thought of any need of eventual confirmation by ulterior and better evidence: and so, *vice versa*, in the case where an instrument executed in Great Britain requires to be authenticated in the East Indies.

To this same purpose, a discovery that perhaps will one of these days be made, is, that, besides the East Indies, the surface of the earth includes other countries, more or less distant from Great Britain: and, in the course of a century or so, at the present rate of the progress of legislation, the benefit of this provision may be expected to be extended to several of those other countries. But for each such country a separate act will be required; and, to warrant the motion for leave to bring in the bill, proof will be required (or at least an assurance given by a certain number of persons) that by the want of such accommodation divers persons have lost their property and been ruined; and, as often as any such bill is brought in, it will be opposed on the ground of innovation; and the proposer will be held up to view in the character of a Jacobinical anarchist, a Utopian speculatist, or both in one.

Voluminousness in tenor, scantiness in purport: thus it is

Note, moreover, that, so far as concerns *written* evidence, (including the fact of its *genuineness*, and the nature of its *contents*), the savings capable of being made in case of contestation, would, the whole mass of them put together, be inconsiderable, in comparison of that which, in the case of the supposed proper script, upon a call made by the party exhibitant, would have place, by reason of admission without contestation, as above.

To these savings in the shape of delay, vexation, and expense, may be added a saving that, in the account of an honest man, will not be regarded as fit to be neglected; a saving in

that these vices, both of them to an insurmountable extent, are the properties of the same body of law. In this same state of things, on the part of men in power, the most anxious of all exertions are those which have for their object the preventing the application of reason to the field of law.

The trial in London; abode of the sole surviving attesting witness, a place in Cumberland or Cornwall; correspondents of his in plenty in London, with volumes of letters received from him; his handwriting would not be believed to be his, without his being dragged from Cumberland or Cornwall, for no other purpose than to say that it is his. A consideration which (on this as on every other occasion) is, by the licensed oppressors of the poor, and plunderers of rich and poor, trodden under foot, is, that, to a man who has not money enough to fetch a witness from Cumberland or Cornwall, the witness might as well be in the East Indies.

Of the sort of script thus allowed to be in this *makeshift* mode authenticated, the description is, of course, inadequate to the demand. Instruments of contract, instruments of the nature of those which are in use to be furnished with *attesting witnesses*, yes. But a script at large, and (for example) a commercial letter or account-book, is this capable of being thus authenticated? Answer,—yes or no: whichever happens to be most convenient and agreeable to the judge. Much may be said on both sides; enough for this purpose on either side.

the article of improbity : improbity on the part of the parties and their professional advisers, improbity on the part of the judges, improbity on the part of the *custos morum*, improbity on the part of the keeper of the royal conscience.

In the ordinary intercourse of life, a man to whom it has happened to deny his own handwriting, is pointed at as a man of lost character; and to such a degree lost, that, to a person to whom the like loss is not a matter of indifference, it may be scarce safe to associate with him.

On what ground is it that, for such a mode of conduct, a man is thus consigned to infamy? On this, or on none, viz. that in this way he was knowingly and wilfully guilty of falsehood : wilful and deliberate falsehood, for the purpose of injustice.

The man by whom his adversary in litigation is loaded with the delay, vexation, and expense of proving (as well as exposed to the peril of not being able after all, in the teeth of so many opposing quirks, to prove at any expense) the genuineness of a document, of which there exists no real doubt ;—literally speaking, and to outside appearance, this man does *not* commit the falsehood that would have been committed had the question, “*Is the genuineness of this document matter of doubt to you?*” been put, and answered in the affirmative. The falsehood is not committed : but what is committed is an injustice ; an injustice, which, in point of mischievousness, is exactly upon a level with such falsehood : the injustice, in which such falsehood would have found its sole object, and its sole advantage.

The falsehood has not been committed; but *why* has it not? Only because the judges (in whom the practice in this behalf has found its creators and preservers,) have taken such good and effectual care to secure, to every dishonest man who in this way finds his account in making himself their instrument, the *benefit* of such falsehood; without that *risk*, which, had the eventual necessity of it been left subsisting, would have constituted the expense of it.

In so far as concerns justice and veracity, there are two codes of morality that in this country have currency and influence; viz. that of the public at large, and that of Westminster Hall. In no two countries can the complexion of their respective legal codes be easily more opposite, than that of those two moral codes, which have currency, not only in the same country, but in the same societies: and, if so it be, that, in the public at large, the system of morals that has place in practice, is, upon the whole, honest and pure; it is so, not in proportion as the morality of Westminster Hall (of which so many samples have already been, and so many more will be, exhibited) is revered and conformed to, but in proportion as it is abhorred. So far as concerns love of truth and justice, the greatest but at the same time the most hopeless improvement would be, the raising of the mind of a thorough-paced English lawyer, on a bench or under a bench, to a level with that of an average man taken at random, whose mind had not, for professional views and purposes, been poisoned with the study of the law: as, on the other hand, in point of sound understanding and true wisdom, the raising the

same sort of mind to a level with that of a man of competent education, of the nature of that to which the term *liberal* is commonly applied.

Yes: it is from novels such as Maria Edgeworth's, that virtues such as the love of justice and veracity,—it is from the benches, the bars, the offices, the desks, in and about Westminster Hall, that the hatred of these virtues, and the love of the opposite vices,—is imbibed. But that which to Maria Edgeworth was not known, or by Maria Edgeworth was not dared to be revealed, is the genealogy of her *Lawyer Case*: that that very ingenious and industrious gentleman had for his elder brother the Honourable Charles Case, barrister at law, M.P. in the lower house; and both of them for their father the Right Honourable the Lord Chief Justice Case, Christopher Baron Casington, in the upper: and that it was only by executing the powers given or preserved to him, and earning the rewards offered and so well secured to him, by his noble and learned father, that the younger son became what he was.

How long, for the self-same wickedness, shall the inferiors in power and opulence, the inferiors who are but instruments, be execrated, and the superiors, who are the authors of it, adored? Attorneys, solicitors, were they the makers of judge-made law? Were they the makers of the system of technical procedure? Were they the makers of the law of evidence?

CHAPTER VI.

ABERRATIONS OF ENGLISH LAW IN REGARD
TO THE AUTHENTICATION OF WRITTEN
EVIDENCE.

THE distinction between *provisional* and *definitive* authentication is unknown to English law. In all cases alike, it insists upon having the authentication performed in the same mode; without allowing of any exceptions on the score of vexation, expense, or delay. It presumes all mankind to be forgers; and, where there is forgery, affords no facilities for the detection of it. It guards against deception where there is none to guard against; and where deception is at work, interdicting the interrogation of the suspected person, it interdicts the most efficient means of scrutiny.

Previous meeting between the parties, for the purpose of ascertaining whether any and what documents presented by one party are contested by the other, there is none: disputed or not, the authenticity of every document must be *proved*.

True it is, that, for saving of delay, vexation, and expense, sometimes it does happen, that

on one or both sides the genuineness of this or that instrument of contract or other script, (or, as it may happen, of all the scripts meant to be exhibited), is *admitted*.

But it is only in so far as, on both sides, or (if it be an equity suit or cause) on *all* sides, and that to an indefinite number, all persons concerned, law advisers as well as suitors, are honest, — and not only *negatively* honest, but completely and *actively* and zealously honest, — that any such admission, with the consequent savings, can have place. If, by any such admission, a law adviser were to prevent his client from reaping any advantage which by the refusal of it might be obtainable (whether for want of the adversary's being able to procure the evidence, or by thrusting him out of the contest by the intolerable pressure of the expense), — his conscience would hardly acquit him of treachery, in betraying his client's interest.

“Not so,” (says somebody): “for, by the fear of eventual costs, (*i. e.* of the eventual obligation of reimbursing the costs on the other side), a dishonest, no less than an honest, man may be restrained from giving increase to such costs, though it be on the other side.”

True, if every man were his own lawyer: but, under the reign of technical procedure, no man ever is, or with any the smallest chance of success can be, his own lawyer: and, so long as the system of procedure remains on that level in the scale of unintelligibility, to which it has been raised by the undiscontinued exertions of so many ages, the quantum of each man's burthen in this shape will always depend

upon the sort of man, whose interest it is that it be as heavy as possible.

In this state of things, for the keeping down of superfluous expense on the part of his client, no degree of honesty on his part would suffice, without that sort and degree of honesty on the part of his law adviser, the existence of which (unless here and there, by great good fortune), under such encouragement as is given to him to be dishonest, it would be altogether absurd and idle to expect.

Without the preliminary meeting above spoken of, it is physically impossible that, in relation to the matter in question, justice, or any thing approaching to it, should be done. Injustice, in the shape of needless delay, vexation, and expense, if not in the shape of actual misdecision, is unavoidable.

But although, without the aid of this arrangement, it is impossible that wrong should not be done, yet there are degrees of wrong: and, in instances to a great extent, wrong, over and above what was rendered necessary by the absence of this arrangement, will actually be seen to be done.

From the determination taken to put an exclusion upon that which is not only the best evidence, but the least burthensome evidence, viz. the evidence of the parties, follow, 1. (in violation of the dictates correspondent to the direct ends of justice) two opposite mischiefs; not only groundless exclusion, but rash and insufficiently guarded admission; and 2. (in violation of the dictates correspondent to the collateral ends of justice), enhancement of the necessary burthen: an enhancement, to the

amount of which there are no assignable bounds : nor let it ever be out of mind, that, — whenever the expense which presses upon him who has right on his side, swells beyond endurance, — misdecision, to the destruction of his right, is the consequence ; and the evil opposite to the direct ends, is either substituted or added to the evil opposite to the collateral ends, of justice.

I. Exclusion put upon the testimony of parties : viz. even at the trial.

II. Exclusion put upon the testimony of non-attesting witnesses.

III. Admission given to instruments without authentication : *i. e.* admission given, without other proof, to an instrument purporting upon the face of it to be of a certain age, viz. thirty years old or upwards.

IV. Inadequate mode of bringing to view the supposed contents of a script in possession of the adversary.

For exemplification of the mischievousness, absurdity, and inconsistency, (not to say improbity), by which the practice in relation to this subject is characterized, a brief observation or two under the above several heads may suffice. But so full of complication, self-contradiction, and uncertainty, is this same practice, that the idea given of the chaos by the few samples of it thus brought to view, is little less inadequate than would be the idea of a house, by the like number of bricks picked out of it.

I. Exclusion put upon the testimony of parties : viz. at the trial of the cause.

In regard to the species of fact here in question, as in regard to every other, the most satis-

factory, and on every account beyond comparison the most eligible, evidence, (need it again be said ?) is that of the parties : viz. in relation to each fact, that one of the parties against whom it makes.

By the exclusion put upon the preliminary meeting, this evidence stands excluded, from the commencement of the cause. And when, at the end of half a year, or a whole year, or some number of years, from the day of the commencement, that inquiry which ought to have begun and in most instances would have been concluded on that same day, is, under the name of *the trial*, suffered to take place ; upon this same best evidence is an exclusion again put, by means of another exclusionary rule.

In the eye of common sense, this is the best evidence possible. In the eye of the law, it is no evidence at all : therefore not the *best* evidence. For, on this part of the field, when exclusion is the object, out of the word *best* is formed the basis of the pretence.

Always excepted (I mean from the exclusionary rule) the case where an extra price, and that a most enormous one, is paid for opening the door to that which otherwise would be the excluded evidence ; viz. at the equity shop and elsewhere. By the immeasurable and profitable addition thus made to vexation and expense together, coupled with the comparative badness of the *shape* in which the evidence is extracted, the objection which would otherwise have been so peremptory, is now removed.

Rather than give admission to that best and most satisfactory of all evidence, no evidence so loose and unsatisfactory but that admission

will be given to it: in the case of an instrument of contract, for example, proof (*i. e.* what is called proof, viz. mere circumstantial evidence) of the genuineness of a couple of words purporting to be the name of an attesting witness. Look at these words, viz. *John Smith*. Did you ever know any person who ever bore that name?—Yes.—Did you ever see him write, or receive letters which you understood to have been written with his hand?—Yes.—Judging from these opportunities, do you believe these words to have been written by him?—Yes.

True it is, that, when no better is to be had, the exigence of the case necessitates the reception of this loose, this circumstantial evidence. But, when the case affords not only direct evidence, but the most trustworthy of all direct evidence,—to exclude that best evidence, and admit this loose evidence instead of it! How inexplicable the folly, were it not for the sinister interest that lurks at the bottom of it!

Wounded by the rule itself, justice is again wounded by the evasions of the rule.

1. Three obligors jointly bound in a bond. Proof by extraneous witnesses (it must be supposed) being somehow or other unobtainable, one of the obligors is called to prove the execution of it. But, for this purpose, he must have been left out of the action, and the recourse against him lost. Just as it happens in penal cases, where one of two malefactors is let off, that his testimony may be employable against the other.

2. If a subscribing witness is become infamous,—on producing his conviction, his hand may be proved as if he were dead. Here

inferior evidence is let in, to the exclusion of the best: circumstantial, to the exclusion of direct. So much for security against deception. Moreover, the conviction must be produced: a lumbering record lugged in, at a heavy and unnecessary expense, to prove a fact in itself notorious, and capable of being sufficiently proved by less expensive means; and which, after all, cannot be sufficiently proved by this means. John Brown was convicted; true: but how does the dead parchment prove that it was the same John Brown?

3. So, when an attesting witness, being the only surviving witness, had become interested,* without any prejudice to his character, his hand was allowed to be proved by somebody else, on the presumption that he himself would have denied it. Pre-established rules apart, the experiment might have been tried, at least; and if he had perjured himself, then might it have been time enough to encounter the perjury by other evidence.

II. Exclusion put upon the testimony of non-attestors.

Witnesses to the number of half a dozen or half a score, all of them unexceptionable, are ready to be produced; each of them ready to say, "I saw the several parties attaching their respective signatures to this instrument, saying, (each of them), *I deliver this as my act and deed.*"

Quibbleton, counsel for the defendant, addressing himself to the first of these witnesses: What is your name?

Answer. John Stiles.

* Comyns, 106.

Quibbleton. My lord, here is the deed : two, (your lordship sees) and but two, attesting witnesses; neither of them is named John Stiles.

Judge. Set aside this witness.

Half a dozen or half a score, all of undisputed character, all ready to speak to this plain fact, and not one of them permitted.* Why not permitted? Answer: Because, in the first place, if permitted they would all perjure themselves: in the next place, having thus perjured themselves, they would all of them, in spite of counsel's cross-examination and judge's direction, obtain credence. Two persuasions these, neither of them (it is true) avowed, because, when absurdity or improbity enter upon the stage, they do not, either of them, present themselves stark naked. But, to give to the exclusion so much as the colour of being conducive to the ends of justice, these persuasions must both of them be entertained; or, at any rate, of the matters of fact respectively predicted by them, the *certainty*, or (to speak with a degree of correctness new as yet to lawyers' language) the *preponderant probability*, must be assumed.

* Probably enough, in any individual case which gave birth or confirmation to this doctrine, the exclusion was not actually put upon any greater number than *one* witness. But in the nature of the case there is not any thing to hinder the presence of any such percipient but non-attesting witnesses, in these or any still greater numbers: and (let the number in attendance have been ever so great) the same reason that sufficed for the exclusion of the one who was first tendered, would have sufficed for the exclusion of all the others: nor, therefore, were it ever so great or ever so small, would the number actually in readiness to be produced have appeared, unless by accident, upon the face of the report or treatise.

But supposing these persuasions entertained, on what ground is it that they must have been entertained? On this ground, and no other, viz. that the names of these persons are not to be found upon the face of the instrument, in the character of attesting witnesses.

Exists there, then, any article of law, by which it is required (on pain of nullity, or any other pain), that, upon the face of every deed of the sort in question, (wills being out of the question), there shall be visible the names of two persons in the character of attesting witnesses? No: neither of any article of real (*i. e.* legislative) law, nor so much as any rule deduced in the shape of judge-made law.

On what ground, then, stands the rejection? Answer: On this ground, viz. that,—when the name of a person, purporting to have been written by him in the character of an attesting witness, is visible on the face of the instrument,—the testimony of any number of persons who (if they are to be believed) *actually* saw what it is there *declared* that this man saw, is not, with relation to the fact in question, *the best evidence*.

Non-Lawyer. What?—The evidence being *good* enough to produce a complete (or at least preponderant) persuasion; in this case, by the mere circumstance of its not being the very best imaginable, (admitting, for argument's sake, that it is not the very best); by this one circumstance, is any sufficient ground afforded for shutting out this evidence, when there is no other? and when, in consequence, if this be shut out, the party who has right on his side must lose his cause?

Lawyer. Oh! but where, there being upon the face of the deed an attesting witness, he is not produced, but instead of him others are produced whose names are not upon the deed, here is an *omission*: from which we draw a conclusion: and the conclusion is, that, had the attesting witness been produced, his testimony would have been against the genuineness of the deed.

Non-Lawyer. And on this conclusion it is that you build the two other necessary conclusions, viz. that the non-attesting witnesses, being all of them so many intended perjurers, would all of them have affirmed the genuineness of the deed, the fact being otherwise, and, thus falsely affirming it, would have gained credence!

With submission, suppositions of a contrary tendency might be raised in any number, any one of them less improbable than the above. Take half a dozen, or so, for examples.

1. We know not where to look for the attesting witness: we know not who he was: we know not whether he be alive or dead.

2. We know indeed who he is, and where he is; but he is not within the jurisdiction of the court.

3. He is, indeed, within the jurisdiction of the court; and the place where he is, is known to us: but that place is far distant: and we,—who, at our peril, on pain of losing his evidence, and along with it (it now seems) our cause, were bound to advance to him whatsoever money, in case of dispute, should be deemed sufficient to defray the necessary and proper expense of his journey to and fro, attendance, and demurrage, whatsoever that might

be, — could not either find of our own so much money, or borrow it: your laws against usury forbidding a man, in recompense for any risk, or for the relief of any exigency, to accept of any extra price.

4. Yes; we do know who he is: and it is because he was so well known to us, that we took care not to call him. He is a dishonest man, an enemy to us, and in league with the parties on the other side. After having promised or not promised to come, he would, after all, come or not come, according as, in their view of the matter, it would be best for them that he should or should not come. If he did come, he would deny his own handwriting: *I know nothing about the matter*, he would say: *it was not by me that this name was written*.

By counter-evidence, or even by counter-interrogation, it might have been possible for us, notwithstanding, to extract from him the truth of the case; and the more so, because, in the presence of two other persons, (who are not, however, either of them, at present within our reach), once upon a time he did declare and confess, that the name in question was really written by his hand. But both these means of coming at the truth we are debarred from, by another of your rules: viz. the rule, by virtue of which, merely because we are unfortunate enough to stand thus in need of his evidence, of this enemy of ours, it is said by you that he is our *own* witness; and that, because he is our *own* witness, he must not by us be contradicted, or so much as questioned. Whatsoever may tend to the bringing him to view in this his true

character, whether it be counter-interrogation or counter-evidence, we are thus forced by you to suppress.

Independently of regulation, positive and effectually notified regulation, it is difficult to say what there is that should determine the choice of the party in favour of a supposed *attesting*, to the exclusion of (or even in preference to) a *non-attesting*, but by him equally known to have been a *percipient*, witness. True it is, that, by the signature of the attesting witness, proof is so far given, that in relation to the transaction in question he was a percipient witness; yes: but is it a proof that no *other* person was? a proof, too, which, by those who know that the contrary is true, is to be regarded as a convincing one?

The attesting witness would cost (suppose) so much money to produce: the non-attesting witness may be had for a few shillings less. This, in the eye of a *considerate*, and especially in the eye of a *poor* man, honestly advised, should suffice to give the preference to the non-attesting witness. The attesting witness would, after all expenses paid him, suffer inconvenience (suppose) from the attendance: the non-attesting witness would not suffer any inconvenience: this, in the eye of a *humane* and considerate man, should suffice for securing the like preference.

Oh! but we have a rule about the *best evidence*; viz. that in no case shall any evidence be received but the very best which the nature of the case admits of.

Preciously instructive rule! *We receive no*

evidence but what we receive : for any thing more precise, or intelligible, or wise, or honest, than this, will not be found in it.

No evidence do we ever receive, other than the *best* evidence. And what is the best evidence? Answer : It is, on each occasion, that which we receive as such.

They know not, themselves, what their own rules are. Strange indeed it would be if they did : for, that which has no existence, how is it to be known to any body? They know not themselves what their own rules are ; they resolve that every other man shall know them : that is, without the possibility of knowing them, shall, as often as occasion offers, be punished for not knowing them.

Nemo tenetur ad impossibilia, says another of their maxims. But in any one of their maxims, so sure as there is any thing good, so sure is practice opposite.

Once more : Partly upon the *source*, partly upon the *shape*, depends the goodness of an article of evidence. As to the shape ; in so far as depends upon themselves, in none but the very worst shape (come it from what source it will) do they receive any evidence : and, so it be in this worst, but to themselves most profitable, shape, no source so impure but that from that bad source they are ever ready to receive it. Yet, such is their delicacy, that (as if for evidence, as for meat, there were a market, at which, with money in his hand, a man may pick and choose) none, forsooth, will they put up with, but the very best of evidence.

III. Admission given to instruments without authentication.

By the man of law, whenever you see a gnat strained at, on a second glance make sure of seeing a camel taken up and swallowed.

Behold an instrument, for the authentication of which, to-day, a whole score of witnesses, who (every one of them if they are to be believed) were percipient witnesses of the execution of it, (they not being attesting witnesses), will not suffice: it is accordingly dealt with as if it were forged. Wait till to-morrow, this spurious deed becomes genuine: and so plainly genuine, that, for the proof of its genuineness, no evidence is required.

This metamorphosis, who was the god that operated it? Answer: The god Time. Yesterday the script wanted a day of being thirty years old: to-day the thirty years are fulfilled.

This admission has neither quite so much absurdity in it, nor quite so much mischievousness, as the exclusions. The instrument, if it be not what it purports to be, is a forgery. Forgery, a flagitious and pernicious crime, is not to be presumed. Independently of particular argumentative grounds, the odds against the fact, as testified by experience, are prodigious: for every forged instrument, you have genuine ones by thousands.

Not but that to this crime (by the exclusion put upon the interrogated testimony of the party by whom or in whose behalf the instrument is produced) every encouragement has been given, which it has been in the power of Judge and Co. to give to it. Suppose the party to have forged it: he puts it silently into the hands of his lawyer, and it is the lawyer's business to fight it up. At the lawyer's elbow,

if so it please him, sits the forgerer. There he may sit till he is tired, for he is in no danger; the law has taken him under her care: not a single question can be put to him.

Convenient as this law is to every criminal, to an honest man it may happen but too frequently to be laid by it under an embarrassment, out of which it seems not altogether easy to say how he is to be delivered.

The instrument purporting, upon the face of it, to be thirty years old, or more; this antiquity, coupled with *possession* (*i. e.* with the relation borne to the suit or cause, or to the fact in question, by the individual in whose possession it has been), is accepted as evidence sufficient for the authentication of it. But the individual (suppose) in whose possession it is, is the plaintiff; and, for the whole of the time that has elapsed since the execution of it, or for a part more or less considerable of that length of time, he has kept it locked up in his strong box: not having in all that time shewn it (because in all that time no occasion has called upon him to shew it) to any person who is without interest in the suit or cause. By whose testimony, then, is the custody of it to be proved? By *his*, the plaintiff's? Oh, no: that would be contrary to the inviolable rule. But if not by *his* testimony, it cannot, by the very supposition it cannot, be proved by that of any one else.

Yes, if he had had information, timely information, of the existence of this rule of law; for in that case he might have got this or that uninterested person to look at it. But if any such information had reached his mind,

the care and pains taken by Judge and Co. for so many centuries to keep it out of his reach would have been frustrated. By keeping them from receiving existence, in and from any determinate form of words, care has been taken, very effectual care, that neither by non-lawyers, nor by lawyers themselves, shall any of these portions of imaginary law be laid hold of by *inspection*. By their uniform repugnance to every conclusion that would be drawn by common sense, care not less effectual has been taken that they shall never have been laid hold of by *inference* or *conjecture*.

If, in this case, the exemption granted from the obligation of authenticating the document by evidence *ab extrâ* is proper, it can only be because, in the other cases, the obligation is itself improper, as being needless. Forgery is not the crime of any particular point of time; whatever be the probability of it at this present day, it was not less on this day thirty years. A deed purporting to have been fairly executed thirty years ago, may have been forged or falsified at the time of the date, or at any rate may have been forged or falsified at any subsequent point of time. Forged writings, of an apparent date two hundred years anterior to their real date, forged writings ascribed to Shakespeare,* have been known to deceive the very elect among English lawyers.†

* See the controversy between Mr. Malone and Mr. Chalmers.

† Another remarkable feature of this fixation, is its being made without authority. Among the radical and incurable vices of jurisprudential (in contradistinction to statute) law, is, its incapacity to make fixations; to fix upon this or that

IV. Shifts, when the script is in the power of the adversary.

The hostility of the technical system to the ends of justice, — the consciousness of that hostility, on the part of those who, while they are acting under it, are profiting by it, — the violation at the same time so continually offered by themselves to the very principles to which by themselves the highest importance is attached, — all this may be seen exemplified in a case which shall now be brought to view.

When the article of written evidence, which the party in question stands in need of, happens to be in the hands of a party on the other side; when an instrument which a plaintiff (for example) stands in need of, happens to be in the possession of the defendant; the sort of shift that has been made is truly curious.

Under a rational system of procedure, the course is plain and easy: the evidence acted upon is of the best kind imaginable. Both

quantity, in any shape, for any purpose; to fix upon this or that quantity, to the exclusion of all others. Analogy is the only instrument which jurisprudence can employ to weave its cobwebs; and, on the ground of law, it is seldom indeed that analogy can be seen to point to any particular quantity, more decidedly than to another. A rule of this sort is what, in English statute law, is called a statute of limitations. If in any one instance a statute of limitations can legally and constitutionally be passed, in the way of jurisprudential law, by this or that bench of judges, or even single judge, instead of Parliament, so may it in every other. In other cases, the usurpation has been more or less veiled; here it is stark naked. Accordingly, it has never been practised but in the dark. The personality of the author of the rule, and even of the decision, has been carefully concealed. No judge has ever avowed the making of it: when brought forward, it has been pretended to be found ready made.

parties being together in the presence of the judge, the plaintiff says to the defendant, "To make out my case, I have need of such or such an instrument" (describing it): "you have it; have the goodness to produce it." "Yes," says the defendant (unless his plan be to perjure himself), "and here it is:" or, "I have it not with me at present; but on such a day and hour as it shall please the judge to appoint, I will bring it hither, or send it to you at your house, or give you access to it in mine."

Under the technical system, no such meeting being to be had, no such question can at any such meeting be put. But, at the trial (viz. under the *common law*, alias *non-equity*, system, of which jury trial makes a part), at the trial, that is, after half a year's, or a year's, or more than a year's, factitious delay, with its vexation and expense; then it is, that, for the first time, a chance for procuring the production of a necessary instrument may be obtained.

Though, neither for any such purpose nor for any other, neither to the party on either side nor to any agent of his, can any thing in the shape of a question be put *viva voce* by a party or agent on the other side,—the question (for example), *the instrument* (describing it), *have you it, or no?*—yet, under the name of a *notice*, a sort of requisition in writing calling upon him to exhibit it, may be, and every now and then is, delivered. Of this notice to exhibit the instrument, what is the effect? That the defendant is under any obligation to exhibit it? No such thing. To produce any such effect, would require nothing less than a suit in

equity ; whereupon the instrument would be exhibited or not : and if exhibited, not till the end of the greatest number of years to which the defendant (having an adequate interest) had found it in his power to put off the exhibition of it. To have enabled the party thus far to obtain justice without aid from equity, would have been robbing the Lord Chancellor and the Master of the Rolls, and the swarm of subordinates of whose fees the patronage part of their emolument is composed.

What, then, is the effect? Answer : That, after this notice, if that best evidence which is asked for be not obtainable,—not obtainable, only because those on whom it depends do not choose it should be obtained,—what is deemed the next best evidence that happens to be in the plaintiff's possession is admitted : and on this occasion no evidence is too loose to be admitted.

After such notice given, one succedaneum that has been admitted is a supposed transcript : “ *an examined copy*,” are the words. Another is, “ *parol evidence of the contents*.”*

In the midst of all this laxity, observe and admire the strictness : “ In case it be a copy

* Admission having thus been given, not only to an examined copy, but even to parol evidence of the supposed contents, would it be given to an *archetypal draught*? to the unrecognized and unsigned original, from which the recognized and signed instrument itself was itself but a transcript? Having to pronounce between these two species of makeshift evidence, while, by the power and for the benefit of the lawyers, the proper and more satisfactory species of evidence is kept out of the way; *common sense* would, without hesitation, answer in the affirmative; *common law*, therefore, after the usual hesitation, not improbably in the negative.

“ that is offered, it must first be proved, that
“ the original, of which it purports to be a
“ copy, was a genuine instrument.” So much
the more business for the benefit of the man of
law : so much the more chance of failure, for
the benefit and encouragement of the wrong-
doer.

But suppose no such copy producible : the
best and only evidence which it is in the plain-
tiff's power to produce, being, as above, “ parol
evidence of the contents :” *i. e.* some account
given of the supposed contents of the supposed
instrument, by a person into whose hands, by
some accident or other, the opportunity of
bestowing upon it a perusal more or less
adequate,—of throwing over it a glance more
or less slight, and thus giving an account of it
more or less correct and complete, — has hap-
pened to find its way.

This casual reporter,—for his report to be
received, is it necessary that he (or, in his stead,
the party by whom he is called in) should have
established in due form the genuineness of the
instrument, which, for ever so short a time,
chance had thus thrown into his hands?

In this one point may be seen a mine, a rich
mine, of future causes.

Behold now another mine. The two sorts
of makeshift evidence thus brought to view in
the case of a *deed*,—viz. a *supposed transcript*
(copy examined or not examined), and *parol*
evidence of supposed contents, — shall they apply,
and under any and what modifications, to any
and what other sorts of scripts?

Delight paints itself on the countenance of
law, at the thoughts of such a mine of nonsuits,

and, to the lawyer at any rate, if not to the client and suitor, of *agreeable surprises*.

Good all this, as far as it goes ; when so it is that a man's good fortune has put into his hands any such makeshift evidence. But if not, what in that case becomes of the notice ? In that case, the wrongdoer triumphs : the party who is in the right loses his right, whatever it may be ; and so the matter ends.

Did but the judge deign to admit at the outset into his presence, the persons whose properties and liberties he has contrived with so little trouble to dispose of ; whatsoever were the instrument wanted, if it were not found in *one* of two hands in which it was expected to be found, it would be in *another* : every instrument that was necessary to justice would be ferreted out : as it actually is, in the case where, justice being necessary to his own personal protection as well as that of the public, it has been the pleasure of the man of law that the necessary instruments should be made forthcoming ; viz. in the preparatory examinations taken, as in a case of murder, robbery, or other felony, by a justice of the peace.

No loophole (or at least not so many loopholes) would then be left for the wrongdoer to creep out of ; thus foiling, for a time, or for ever, the party whom he has wronged.

But, under the technical system, this business of *notices* affords to the wrongdoer an inexhaustible fund of chances :* in this lottery, a *nonsuit* (the produce of which is an additional

* Vide *infra*, Book VIII. Chap. 13. *Chicaneries about Notice*.

suit) constitutes the prize in which Judge and Co., with their protégé and partner, the wrongdoer, are sharers.*

* In one sample more, read at once the nature of judge-made law in general, and therein read the technical system of procedure, and therein, again, the law of evidence in particular.

When the script you want is in possession of your adversary, you have seen already what the succedaneum is, and what sort of chance there is of its being obtainable.

When the script is in possession of a person capable of being a witness (a non-litigant witness); for the purpose of having it exhibited, you serve him with a writ called a *subpœna duces tecum*, by which he is ordered to attend and bring with him the script. If he obeys, it is well: if he obeys, that is, if so it be that he not only attends, but brings it. But what if he comes without it? To this hour, it is not settled what is to be done with him, nor how the script is to be got at and applied in the character of evidence. At any rate, to the party who, being in the right, has need of the evidence, the cause is lost for that time: saved to him, or not saved, the liberty of trying a new one.

Doubts from another mine. The case of the proposed witness comes within some one or other of the thousand and one cases of exclusion. He is weak in mind, interested, a felon, an excommunicated person, an atheist, and so forth. In any such impure hand, may or may not the script be exhibited, (viz. in the first place), if, in obedience to the *subpœna*, it be actually brought? Exhibited? yes: but by whom then is it to be *authenticated*, or any account given of it? In the next place, as to compulsion, and the means thereof; suppose, (notwithstanding the other already-mentioned mine of doubts), suppose it settled, that the hand, if pure and orthodox, would have been compellable; shall the atheistical hand, for example, be compellable? or shall an atheist, on condition of declaring himself such, or a theist, on condition of declaring himself an atheist, be allowed to keep back the necessary document, and thus to gain his point, giving the cause thus to the wrongdoer, whom he is in league with?

All this, like every thing else,—all this ever hath been, is now, and (so long as judge-made law reigneth) ever shall be, exactly as the judge pleases.

I proceed to speak of the course taken by the English law on the subject of authentication, in regard to any sort of documents coming under the notion of *official* evidence; whether as purporting to be the work of an official hand, or to bear upon the face of it a testimony of its authenticity, imprinted upon it by an official signature. Here, under both principles,—the principles here advanced, and those acted upon (as above) by the jurisprudential law in question,—tenor and custody together should be sufficient proof. Upon the principles here advanced, the former alone is sufficient proof: much more that and the presumption *ex custodia* together, when the custody is that of a hand so completely exempt from suspicion as in this case. But, upon the principles of English law, the presumption *ex tenore* alone cannot be sufficient; for to this case the ground of antiquity does not extend; and, as to the other part of the proof, it consists in the custody, which the law does not require.

According to Comyns (95), “a deed indorsed as enrolled shall be read without proof.” According to his continuator, the certificate of the auditor of the dutchy of Lancaster is sufficient evidence of the enrolment of a dutchy lease. According to the same, the indorsement by the proper officer is sufficient evidence of the enrolment of a bargain and sale. If (as I should suppose to be the case) the instrument in question was in these several instances admitted, as an ancient deed would have been, to prove itself; no proof of the official custody in which it had been, was exhibited. But, on this supposition, to call the certificate that of the

auditor, calling the indorsement an indorsement by the proper officer, was a *petitio principii*, an assumption of the very fact that required to be proved. In another case in the same book, where the custody is considered as part of the case, the fact of its being proved is mentioned (40).

Doubts upon doubts might be started upon this topic, and upon the several decisions that have been given on the occasion of it. In the way of statute law, I could undertake to clear up all these doubts, if what ought to be extirpated were fit to be amended. In the way of dissertation, I could undertake for nothing but to thicken them.

END OF THE THIRD VOLUME.

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